124-444

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1887.**

No. 85.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

*vs.*

GEORGE F. HALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

**FILED OCTOBER 11, 1884.**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 12, 1887.

1 Pleas in the circuit court of the United States for the southern district of Iowa, central division, at a term thereof, begun and holden at the United States court-house, in the city of Des Moines in said district, on the second Tuesday of May, it being the 13th day of May, A. D. 1884; before the Honorable David J. Brewer, Hon. James M. Love, and Hon. O. P. Shiras, judges.

Attest: E. R. MASON, *Clerk.*

2 Be it remembered that heretofore, to wit, on the 8th day of March, 1883, a transcript from the circuit court of the State of Iowa, in and for Polk county, was filed in the clerk's office of the circuit court of the United States for the southern district of Iowa, central division, in a certain cause wherein George F. Hall was plaintiff and the Western Union Telegraph Company was defendant, which said transcript is in the words and figures following, to wit:

3 "EXHIBIT A."

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated—that is, telegraphed back to the originating office for comparison; for this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable
4 interruption in the working of its lines, or for errors in cipher or obscure messages; and this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of message to any point on the lines of this company can be insured by contract, in writing, stating agreed amount of risk and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz., 1 per cent. for any distance not exceeding 1,000 miles and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if
5 a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery

limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

THOS. T. ECKERT,
*General Manager.*
NORVIN GREEN, *President.*

Send the following message, subject to the above terms, which are hereby agreed to:

11 | 9, 1882.

To Chas. T. Hall, Exchange, Oil City, Pa.:

Buy ten thousand, if you think it safe. Wire me.

GEORGE F. HALL.

*Petition at Law.*

In the Circuit Court of Iowa in and for Polk County.

GEO. F. HALL *vs.* THE WESTERN UNION TELEGRAPH CO.

6 The plaintiff herein, for cause of action, states that the defendant is, and for a long time has been, a corporation duly organized and doing business at Des Moines, Iowa, and other places in Iowa.

That said def't, at said Des Moines, at 8 o'clock in the forenoon on the ninth day of November, 1882, for the usual compensation then and there paid by the pl'ff, then and there received from the pl'ff, to be sent to and delivered by telegraph forthwith to Chas. T. Hall, at Oil City, Pennsylvania, a message written on one of the blanks of said company, copy of which is hereto annexed, marked Exhibit "A."

That, in fact, def't negligently wholly failed to forward and deliver said message, as directed, during the day the same was taken to be sent as aforesaid and ever since; that said message
7 was to instruct said Chas. T. Hall to buy for the plaintiff ten thousand barrels of petroleum on that day if said Chas. T. Hall thought it safe so to buy the same as a profitable purchase, and that said Chas. T. Hall would so have understood said message; that, in fact, the market price of petroleum at said Oil City on that date was such, to wit: — per barrel; that had such message been delivered, without said negligent delay, during the forenoon of said day, said Chas. T. Hall would at once have acted upon the same and purchased said petroleum for the pl'ff; that pl'ff ordered the purchase of said petroleum as a matter of trade for the profit to be derived upon its sale.

That subsequently and before notice of the failure to send and deliver said message, to wit, on the next day and subsequent
8 days, the price of said petroleum had so advanced that had the pl'ff secured said purchase as directed the pl'ff would,

by its sale on that day and subsequent days, have realized a profit thereon exceeding the sum of $1,500.

That by reason of the said negligent delay and failure of def't to forward and deliver said message pl'ff has suffered the loss and damage as aforesaid in the sum of $1,500, no part of which has been paid, though the same has been demanded.

That on notice to pl'ff of the neglect, failure, and delay to send and deliver said message the market price of said petroleum had so advanced that pl'ff decided not to purchase; that said decision was equivelant to a decision to sell had he purchased said petroleum as ordered and by reason of these facts pl'ff's loss and damage is rendered certain, to wit, $1,500.

9 (Signed) CROM. BOWEN AND
WHITING S. CLARK,
*Att'ys for Pl'ff.*

STATE OF IOWA, } ss:
*Polk County,* }

I, George F. Hall, being duly sworn, on oath say that I am the pl'ff in the foregoing petition, which I have read, and that the allegations therein contained are true, as I verily believe.

—— ——.

Subscribed and sworn to this — day of Dec., 1882, by said Geo. F. Hall, before me—

—— ——.

Endorsed: 5682. C. C. Polk Co., Ia. Geo. F. Hall *vs.* The Western Union Tel. Co. C. 11, 85. 106 in H. Petition. Copy. Fee, $1.50. Filed Dec. 22d, 1882. P. D. Aukeny, clerk. Crom. Bowen & Whiting S. Clark, pl'ff's att'ys.

10 *Petition for Removal.*

GEO. F. HALL, Plaintiff,
*vs.*
WESTERN UNION TELEGRAPH COMPANY, Defendant.

To said circuit court:

Your petitioner, above defendant, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of New York, and that the plaintiff, Geo. F. Hall, was then and still is a citizen of the State of Iowa, and your petitioner offer- herewith a bond, with good and sufficient surety, for entering in circuit court of the
11 United States in the southern district of Iowa, and the central division thereof, on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed unto said circuit court of the United States in an- for the district and division aforesaid. And he will ever pray.

WRIGHT, CUMMINS & WRIGHT,
*Attorneys for Petitioners, Western Union Telegraph Co.*

STATE OF IOWA, } ss :
*Polk County,* }

I, A. B. Cummins, being first duly sworn, do say that I am a member of the firm of Wright, Cummins and Wright, the
12 attorneys for the petitioner in the above-entitled cause; that the said petitioner is not present to verify said petition; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

A. B. CUMMINS.

Subscribed by the said A. B. Cummins in my presence and by him sworn to before me this the 30th day of December, A. D. 1882.

[NOTARIAL SEAL.] MAITLAND D. BARSTOW,
*Notary Public.*

Endorsed: No. 5682. Circuit court of Iowa, Polk county. Hall *vs.* Western Union Tel. Co. Petition for removal. Filed Dec. 30th, 1882. P. D. Aukeny, clerk. Wright, Cummins & Wright, att'ys for petitioner.

13 Know all men by these presents that Western Union Telegraph Company, as principal, and George C. Baker, as surety, are held and firmly bound unto Geo. F. Hall in the penal sum of three hundred dollars, the payment whereof, well and truly to be made unto the said —— ——, heirs, and assigns, jointly and severally, by these presents.

Yet upon these conditions: The said Western Union Telegraph Co. having petitioned the circuit court of the State of Iowa of Polk county, State of Iowa, for the removal of a certain cause therein pending, wherein Geo. F. Hall is plaintiff and Western Union Telegraph Company is defendant, to the circuit court of the United States in and for the southern district of Iowa and the central division thereof:

Now, if the said Western Union Telegraph Company, your petitioner, shall enter in the said circuit court of the United
14 States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals the — day of December, A. D. 1882.

WESTERN UNION TELEGRAPH —, *Principal,*
By WRIGHT, CUMMINS AND WRIGHT, *its Att'ys.*
GEO. C. BAKER, *Surety.*

STATE OF IOWA, } ss:
*Polk County,* }

I, —— ——, of Polk county, the surety on the foregoing bond, being duly sworn, depose and say that I am a resident of the State of Iowa and a property holder therein: that I am worth the sum of six hundred dollars over and above all my debts; that I have property liable to execution in the State of Iowa of the value of more than three hundred dollars.

GEO. C. BAKER.

15 Subscribed in my presence by Geo. C. Baker, and by him sworn to before me this 30th day of December, 1883.

[NOTARIAL SEAL.] MAITLAND D. BARSTOW,
*Notary Public.*

Endorsed: No. 5682. Circuit court of Iowa, —— county. Hall *vs.* Western Union Tel. Co. Removal bond. Filed Dec. 30th, 1882. P. D. Aukeny, clerk. Wright, Cummins & Wright, att'ys.

16 *Original Notice.*

In the Circuit Court of the State of Iowa, in and for Polk County. Jan'y Term, A. D. 1882.

GEORGE F. HALL, Plaintiff,

*versus*

THE WESTERN UNION TELEGRAPH CO., Defendant.

To said defendant:

You are hereby notified that on or before the 22nd day of December, A. D. 1882, the petition of the plaintiff in the above-entitled cause will be filed in the office of the clerk of the circuit court of the State of Iowa, in and for Polk county, claiming of you the sum of fifteen hundred dollars as money justly due from you as loss and damages suffered by the plaintiff, by reason of your negligent failure to send and deliver a telegram, as set forth in said petition, on Nov. 9th, 1882, from the plaintiff to Chas. T. Hall, at Oil City, Pa., and that unless you appear thereto and defend before noon of the second day of the Jan'y term, A. D. 1883, of the said court,
17 which will commence on the second day of January, A. D. 1883, default will be entered against you and judgment rendered thereon.

CROM. BOWEN AND
WHITING S. CLARK,
*Attorneys for Plaintiff.*

This notice came into my hands December 22, 1882, and I certify that I personally served the same on the within-named Western Union Telegraph Company, by offering to read the same to T. A. Yeamshaw, agent of said company, which he waived, and delivering

a copy of the same in Polk county, Iowa, on the 22nd day of December, 1882.

A. D. LITTLETON,
*Sheriff of Polk County, Iowa.*
By F. A. BAYLIESS, *Deputy.*

Fees, 90c.

Endorsed: Original notice. Circuit court. Geo. F. Hall *vs.* The Western Union Tel. Co. Received Dec. 22nd, 1882. A. D. Littleton, sh'ff Polk county, Iowa. Filed Dec. 26th, 1882. P. D. Aukeny, clerk. Crom. Bowen and Whiting S. Clark, plaintiff's att'ys.

18 Transcript of journal entry in the case of Geo. F. Hall *vs.* The Western Union Telegraph Company, made in Polk county circuit court January 6th, 1883. Journal 15, page 448.

GEO. F. HALL
*vs.*
WESTERN UNION TELEGRAPH COMPANY. } No. 5682. Law.

January 6th this cause coming on for hearing on petition and bond of defendant for a removal of this cause to the Federal court. The court being fully advised in the premises, approves the bond, and it is ordered that this cause be transferred to the United States circuit court, central division, southern district of Iowa.

*Costs.*

| | |
|---|---|
| Clerk | $3 25 |
| Transcipt | 3 00 |
| Plaintiffs' att'y, copy fee | 1 50 |
| Littleton sh'ff, or'g notice | 90 |
| | $8 65 |

STATE OF IOWA, } *ss:*
*Polk County,* }

19 I, P. D. Aukeny, clerk of the circuit court of the State of Iowa in and for the county of Polk, do hereby certify that the foregoing is a true copy of the original papers in the above-entitled cause; also journal entry and costs.

Witness my hand and the seal of said court hereto attached, at Des Moines, this 15th day of Jan., 1883.

[SEAL.] (Signed) P. D. AUKENY,
*Clerk Circuit Court.*

Endorsed: No. 3054, law. George F. Hall *vs.* Western Union Telegraph Company. Transcript from circuit court Polk county, Ia. Filed Mar. 8, 1883. E. R. Mason, clerk.

20 And on the 8th day of March, 1883, the defendant, by Wright, Cummins and Wright, its attorneys, filed in said cause a præcipe for appearance in the words and figures following, to wit:

21 *Præcipe for Appearance.*

In the United States Circuit Court, District of Iowa.

GEORGE F. HALL, Plaintiff,

*vs.*

THE WESTERN UNION TELEGRAPH COMPANY, Def't.

The clerk of said court will please enter our appearance for the defendant in above cause, and docket the same on the law docket.

WRIGHT, CUMMINS AND WRIGHT.

Endorsed: 3054. Hall *vs.* Western Union Telegraph Company. Præ. for app. of def't. Filed March 8th, 1883. Ed. R. Mason, cl'rk.

22 And on the 4th day of May, 1883, the defendant, by its attorneys, Wright, Cummins & Wright, filed in said cause a demurrer to petition in the words and figures following, to wit:

23 *Demurrer.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GEO. F. HALL *vs.* WESTERN UNION TELEGRAPH COMPANY.

Comes now the defendant and demurs to the petition herein and for cause shows:

1. That it appears from said petition that as a condition precedent to bringing action or any liability on the part of defendant, the claim for damages must have been presented in writing to defendant within 60 days after sending the message, and it is not alleged that it was so done.

2. There is no allegation that said message was repeated or directed to be repeated; under the conditions of the message defendant is not liable for more than fifty times the amount received for transmitting of said message, and said amount is not stated.

24 (3.) The damages alleged to have been sustained are too remote and speculative to be recovered for the negligence alleged.

WRIGHT, CUMMINS & WRIGHT,
*For Def't.*

[Endorsed:] In U. S. circuit court, central division, southern district of Iowa. Geo. F. Hall *vs.* W. U. Tel. Co. Demurrer to petition. Filed May 4th, 1883. Ed. R. Mason, clerk. Wright, Cummins and Wright, attorneys for def't.

25 And on the 7th day of April, 1884, a trial notice was filed in said cause in the words and figures following, to wit:

26 In the United States Circuit Court, Central Division of Southern District of Iowa.

GEORGE F. HALL, Plaintiff,

*vs.*

WESTERN UNION TEL. CO., Def't.

The clerk will place the above-entitled cause on the trial calendar of May term, 1884. It will be ready for trial upon issues of fact.

WRIGHT, CUMMINS AND WRIGHT,
*Attorneys for Defendant.*

Endorsed: No. 3054 L. U. S. circuit court, central division of southern district of Iowa. Geo. F. Hall *vs.* Western Union Telegraph Co. Notice of trial. Filed April 7, 1884. Ed. R. Mason, clerk. Wright, Cummins and Wright, attorneys for def't.

27 And on the 14th day of May, 1884, the plaintiff, by Crom. Bowen and Whiting S. Clark, his attorneys, filed in said cause an amended & substituted petition in the words and figures following, to wit:

28 *Amended and Substituted Petition.*

In the U. S. Circuit Court, S. Dist., Ia.

GEO. F. HALL *vs.* WESTERN UNION TELEGRAPH CO.

The pl'ff states that on the morning of Nov. 9th, 1882, at 8 a. m., at Des Moines, Iowa, the pl'ff employed the def't, a corporation duly organized and doing a telegraph business, to transmit immediately by telegraph a message from said Des Moines to Chas. T. Hall, Oil City, Pa., a copy of said message is annexed to the original petition herein and marked Exhibit A and made a part hereof.

That the purpose and intention of the pl'ff in sending said message was to direct said Chas. T. Hall to purchase at said Oil City, Pa., for the pl'ff 10,000 barrels of petroleum oil, in case the said Chas. T. Hall deemed the purchase safe and advisable as an
29 investment; that pl'ff paid def't the usual charge for the immediate transmission of said message.

That a reasonable time for the transmission of said message was three hours, and that in fact said message was received by def't's operator at said Oil City at 11 o'clock a. m. of said day, but incomplete from the omission therein of the address, "Chas. T. Hall;" that in transmitting said messsage def't negligently omitted and failed to transmit and have the operator at said Oil City receive said address as a part of said message; that a reasonable time for the delivery of said message to said Chas. T. Hall at said Oil City, if the same had been correctly addressed to him, was 30 minutes; that in fact said message was not delivered to Chas. T. Hall till about 6 o'clock p. m. on said day in its incomplete condition
30 and too late for him to make the purchase directed by said message that day.

That had said Chas. T. Hall rec'd said message any time from half-past eleven o'clock a. m. to twelve o'clock noon on that day he would have made said purchase as he deemed it safe and advisable; that the market price of said oil at 11.30 a. m. on that day was $1.15 per bbl., and at 12 o'clock noon on that day $1.17 per bbl.; that said purchase could only be made at the Oil Exchange, at said Oil City, a board of trade with officers and members holding daily sessions from ten a. m. to four p. m. to buy and sell said oil; that on the opening of said exchange at 10 a. m. the next day the market price of said oil was $1.35 per bbl.; that at the close of said ex-
31 change, the day said message was sent at 4 p. m., the market price of said oil was $1.29½ per bbl.; that plaintiff presented the claim herein set forth in writing to def't within 60 days after the same occurred.

Wherefore plaintiff asks judgment against defendant for damages in the sum of two thousand dollars and costs.

(S'g'd) CROM. BOWEN AND
WHITING S. CLARK,
*Pl'ffs' Attorneys.*

Endorsed: U. S. C. court, S. district Iowa. Geo. F. Hall *v.* Western Union Tel. Co. Amended and substituted petition. Filed May 14th, 1884, by consent of parties. Ed. R. Mason, clerk. Crom. Bowen and Whiting S. Clark, pl'ff's att'ys.

32 And on the 14th day of May, 1884, the defendant, by Wright, Cummins and Wright, its attorneys, filed in said cause its answer to the amended and substituted petition in the words and figures following, to wit:

33 *Answer.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GEO. F. HALL *vs.* WESTERN UNION TELEGRAPH COMPANY.

Comes now the defendant and for answer to the amended and substituted petition filed herein, says:

It admits the delivery of the message for transmition as alleged in said petition.

As to the purpose or intention of plaintiff in sending said message it had neither knowledge nor information sufficient to form a belief, and it therefore denies the allegations of the petition in that regard.

It admits that under ordinary circumstances three hours is a reasonable time for the transmission of a message from Des Moines, Iowa, to Oil City, Pennsylvania.

34 It admits that in the transmission of said message the name of Chas. T. Hall was omitted therefrom, but denies that the said omission was by the negligence of defendant.

It further alleges that by reason of said omission it became necessary to repeat said message to the sending office, which was done

with reasonable diligence, and said omitted name being furnished said message was delivered with reasonable care and promptness.

It denies each and every other allegation of said amended & substituted petition.

Further answering, the defendant says that the plaintiff wrote and delivered said message to the defendant upon one of its ordinary and usual telegraphic blanks and was received by defendant, under certain terms and conditions printed upon said blank and well known to the plaintiff at the time of delivering the same, and which terms and conditions were then and there agreed to
35 by plaintiff; that one of such conditions was as follows, to wit: "To guard against mistakes or delays the sender of a message should order it repeated; that is telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrep'td message, whether happening by negligence of its servants or otherwise beyond the amount received for the same, nor for mistakes or delays in the transmission or delivery or non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case
36 for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages; and this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination." And the defendant alleges that the plaintiff did not request, at any time, the defendant to repeat said message or pay or offer to pay therefor.

Defendant further alleges that another of the conditions and terms under which said message was received by defendant, as agreed by plaintiff, is as follows: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message;" and the plaintiff did not within sixty days after sending said message, or at any other time, present his claim in writing to the defendant.

37 Defendant further alleges that said message is obscure; that it had, when it so received the same, no other knowledge or information as to its meaning than was disclosed by the message itself, and that defendant did not know such meaning.

Wherefore it prays for judgment for costs.

(Signed) WRIGHT, CUMMINS & WRIGHT,
*Att'ys for Def't.*

Endorsed: In United States circuit court, central division, southern district of Iowa. George F. Hall *vs.* Western Union Telegraph Co. Answer. Filed May 14, 1884. By consent of parties. Ed. R. Mason, clerk. Wright, Cummins and Wright, att'ys for def't.

38 And on the 20th day of May, 1884, a stipulation as to facts, etc., was filed in said cause in the words and figures following, to wit:

39 EXHIBIT "A."

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms:

To guard against mistakes or delays the sender of a message should order it repeated—that is, telegraphed back to the originating office for comparison. For this one-half of the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable
40 interruption in the working of its lines or for errors in cipher or obscure messages; and this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and, if a message is sent to such office by one of — company messen-
41 gers he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office, for delivery at a greater distance a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending of message.

THOS. E. ECKERT,
*General Manager.*
NORVIN GREEN, *President.*

Send the following message, subject to the above terms, which are hereby agreed to:

11–9, 1882.

To Chas. T. Hall, Exchange, Oil City, Pa.:

Buy ten thousand if you think it safe. Wire me.

GEO. F. HALL.

EXHIBIT B.

The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability which have been assented to by the sender
42 of the following messages. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days of the sending of the message.

This is an unrepeated message and is delivered by request of the sender under the conditions above named.

THOS. E. ECKERT,
*General Manager.*
NORVIN GREEN, *President.*

Number 26: Sent by T.; 10, paid check.
Received at $1^{65}$, 3.
Dated Des Moines, Iowa. 9

To Exchange, O. C.:
Buy ten thousand if you think it safe. Wire me.
GEORGE F. HALL.

Across the face: Notified 11 | 9; 11.30 a. m.

43 *Stipulation.*

In the United States Circuit Court, Southern District of Iowa, Central Division.

GEO. F. HALL *vs.* THE WESTERN UNION TELEGRAPH CO.

Stipulation of facts to be used in the trial of the above-entitled action.

Defendants received plaintiff's message at their Des Moines office, Iowa, at 8 o'clock a. m. November 9th, 1882, for immediate transmission to Chas. T. Hall, as directed.

The original message is annexed and made a part hereof, marked "Exhibit A." The plaintiff paid the defendant the usual charge for sending said message. On the receipt of said message by defendants' operator at their Oil City, Pa., office at 11 o'clock a. m. November 9, 1882, a part of the address had been omitted. The message, as received by the operator at Oil City, Pa., is annexed hereto, marked "Exhibit B."

No steps were taken to procure the correct address till the message had been sent to the Exchange building named therein
44 where the officers of the board of trade refused to receive it at 11.30 a. m. that day and then the correct address was pro-

cured by telegraphing to the sending office, and the operator at Oil City would testify that he did not in fact know that a part of the address had been omitted until so advised by the sending office. Message was delivered to said Chas. T. Hall at about 6 o'clock p. m. Nov. 9, 1882, to- late to make the purchase referred to in the message on that day. (The time reasonably necessary for the delivery of the message from the office in Oil City to Chas. T. Hall if correctly directed when received was 30 minutes.)

The message was intended by the sender to direct said Chas. T. Hall to buy 10,000 barrels petroleum oil for the plaintiff if the market price when the message was received was such that said Chas. T. Hall thought it safe to do so and would so have been
45 understood by him, and Chas. T. Hall would testify that if he had received said message at any time from 11.30 a. m., November 9, 1882, to 12 m. that day he would have made the purchase for the plaintiff as directed, and that he remembers that when he did receive the telegram at 6 o'clock p. m. of said day he came to the conclusion that if it had been received before twelve m. he would have thought it safe and advisable to make the purchase as the market then was, and that he made purchases for himself at that time, viz, between 11.30 and 12 m.

The price of said oil at said Oil City at 11.30 a. m. that day was $1.15 per barrel, at 12 m. that day $1.17 per barrel, at the close of the Oil Exchange at 4 p. m. that day $1.29½ per barrel; such purchases could not be made after the close of the Oil Exchange
46 till its opening at 10 a. m. the next day when the price was $1.35 per barrel, and said Chas. T. Hall did not deem it safe and advisable to buy at that price.

The Exchange named in the plaintiff's message was itself a building at Oil City, Pa., well known by every one there, where members of a board of trade, with a regular organization with president, secretary, and directors, held daily sessions from 10 a. m. till 4 p. m. to buy and sell said oil at the market prices, and said Chas. T. Hall was a member thereof, and this was the only place where such sales and purchases as the one in question were made at said Oil City.

The memorandum on said message, "Exhibit B," means that defendant notified the officers of said board of trade at said exchange at 11.30 a. m., November 9, 1882, of said message, but the officers refused to receive the same.

It is further stipulated that the defendant had on the 9th
47 of November, 1882, no other information as to the meaning or importance of said message than what was disclosed by the message itself, and that its employé at said DesMoines office did not know what was directed to be purchased by said message.

That the plaintiff, the sender of said message, did not request defendant to repeat the same, nor offer to pay therefor.

That the plaintiff's claim for damages has never been presented in writing to the defendant otherwise than by bringing this suit and by service of the original notice herein, as shown by the officer's return thereon, which are made parts hereof.

It is further stipulated that this shall be submitted to the court upon the above statement of fact, waiving a jury.

(Signed) CROM. BOWEN & WHITING S. CLARK,
*Att'ys for Plaintiff.*

(Signed) WRIGHT, CUMMINS & WRIGHT,
*For Defendant.*

Endorsed: U. S. circuit court. Geo. F. Hall *vs.* Western Union Tel. Co. Stipulation of facts. Filed May 20th, 1884. Ed. R. Mason, clerk.

48 And on the 20th day of May, 1884, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

49 United States Circuit Court, Southern District of Iowa, May Term, 1884.

TUESDAY, *May 20th*, 1884.

GEO. F. HALL
*vs.*
WESTERN UNION TELEGRAPH COMPANY. } No. 3054. Law.

This cause came on this day for hearing and, by stipulation of parties filed, a jury is waived—plaintiff appears by Whiting S. Clark and defendant by Wright, Cummins and Wright—and after argument of counsel the cause is submitted to the court upon the pleadings and proofs filed.

50 And on the 24th day of May, 1884, in the record of the proceedings in said court is an entry of judgment and certificate of division of opinion in said cause in the words and figures following, to wit:

51 United States Circuit Court, Southern District of Iowa. May Term, 1884.

GEO. F. HALL
*vs.*
WESTERN UNION TELEGRAPH COMPANY. } No. 3054. Law.

SATURDAY, *May 24th*, 1884.

This cause came on this day for hearing, having been heretofore submitted to the court. Plaintiff appears by Crom. Bowen and Whiting S. Clark, and defendant by Wright, Cummins and Wright, and the court, being advised in the premises, finds for the plaintiff and assesses his damages at the sum of one thousand eight hundred dollars. It is therefore considered, ordered, and adjudged that the plaintiff, George F. Hall, do have and recover of and from the defendant, The Western Union Telegraph Company, the sum of one thousand eight hundred dollars ($1,800.00), with interest thereon from this date, at the rate of six per cent. per annum, together with

the costs herein, taxed at $ ——, and that execution issue
52 therefor; and the judges upon the said trial, being divided in opinion as to certain questions arising in said cause, it was ordered that the following be certified to the Supreme Court of the United States for its decision thereon, to wit:

In the United States Circuit Court in and for the Southern District of Iowa, Central Division. May Term, 1884.

GEORGE F. HALL *vs.* WESTERN UNION TELEGRAPH COMPANY.

Crom. Bowen & W. S. Clark, for plaintiff; Wright, Cummins and Wright, for defendant.

*Finding of Facts and Certificate of Division of Opinion.*

This case was submitted to the court, a jury being waived upon a stipulation setting forth certain facts admitted by the parties, and also containing what certain persons would testify if called as witnesses.

The court finds the following as the material facts in the case.

53 The plaintiff at eight o'clock a. m., November 9th, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraph dispatches at its office in Des Moines, Ia. ,a message in the following form, and plainly written on one of the usual blank forms furnished by the company:

Form No. 2.

The Western Union Telegraph Company.

All messages taken by this company are subject to the following terms. To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or de-
livery or non-delivery of any unrepeated message, whether
54 happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at following rates, in addition to the usual charge for repeated messages, viz.:

one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is
55 authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

NORVIN GREEN, *President.*
THOS. T. ECKERT,
*General Manager.*

Receiver's No. —. Time filed, 8 a. m. — check.
Send the following message, subject to the above terms, which are agreed to.

11 | 9, 1882.

To Chas. T. Hall, Exchange, Oil City, Pa.:
Buy ten thousand if you think it safe. Wire me.

GEO. F. HALL.

Read the notice and agreement at the top.

56 The same being furnished and received by the defendant for immediate transmissal to Charles T. Hall, at Oil City, Penna., the usual and ordinary charge therefor being paid by plaintiff. Through the negligence and want of ordinary care on part of defendant's employé at Des Moines the message so received was forwarded to Oil City, Penna., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Penna., at 11 o'clock a. m., November 9th.

The operator of def't at Oil City sent the message to the building know as the Exchange, which was used by a board of trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 a. m. until 4 p. m. The officers of the exchange or board of trade refused to receive the dispatch in
57 question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the despatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall at six o'clock p. m. November 9th, 1882. Had it not been for the error in sending the despatch without including the name of Charles T. Hall it would have been delivered to him at Oil City at 11.30 a. m. November 9th, 1882. The meaning of the dispatch was to direct Chas. T. Hall to buy ten thousand barrels of petroleum if in his judgment it was best to do so. Had the dispatch upon its first receipt at Oil City, Penn., been promptly delivered to Charles T. Hall he would, by twelve

m. of November 9th have purchased ten thousand barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff.

When the dispatch was delivered to Charles T. Hall the ex-
58 change had been closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff. At the opening of the board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase, and hence did not do so.

It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10th, 1882. The operators acting for the defendant had no other knowledge of the meaning or purpose of the dispatch than is to be gathered from the message itself.

The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the despatch in question in the circuit court of Polk county, Iowa, the original notice being served upon the defendant on the 22nd day of December, 1882. Under the statutes of Iowa actions in the courts of that State,
59 are commenced by serving upon the defendant an original notice, which is signed by the plaintiff or his attorney, and is addressed to the defendant. No summons or writ under the seal of the court is issued. The notice in this case was addressed to the defendant, and, after entitling the cause, proceeded as follows: "You are hereby notified that on or before the 22 day of December, 1882, the petition of plaintiff in the above-entitled cause will be filed in the office of the clerk of the circuit court of the State of Iowa, in and for Polk county, Iowa, claiming of you the sum of fifteen hundred dollars, as money justly due from you as a loss and damage suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram, as set forth in said petition, on Nov. 9th, 1882, from plaintiff to Chas. T. Hall, at Oil City, Pa., and that unless you appear thereto and defend before noon of the second
60 day of the January term, A. D. 1883, of the said court, which will commence on the 2nd day of January, A. D. 1883, default will be entered against you and judgment rendered thereon. Crom. Bowen and Whiting S. Clark, attorneys for plaintiff."

No other presentation of the claim was made by plaintiff. Upon the foregoing facts it is the opinion of the presiding judge that the law is with the plaintiff and that he is entitled to judgment in the sum of eighteen hundred dollars, and it is so ordered as the judgment of the court.

The judges holding said circuit court, and before whom said cause was tried, hereby certify that on said trial of said cause they were divided in opinion and were unable to agree upon the following questions of law arising on said trial and necessary to be determined in order to finally determine said cause, to wit:

61 1st. Can the defendant, having in the usual line of its business accepted said message from plaintiff for transmissal to the party named therein at Oil City, Pa., and having received its usual charge for such service be heard to say that it was not bound to exercise ordinary care in transmitting the same, and that it is

only liable to the plaintiff in damages in case of gross negligence on its part.

2nd. Under the contract legally existing between the plaintiff and defendant whereby the latter assumed the duty of forwarding said message, the same being an unrepeated message, was the defendant bound only to the exercise of slight care or to the exercise of ordinary care?

3rd. Under the contract legally existing between plaintiff and defendant, whereby the defendant assumed the duty of forwarding said message, the same being an unrepeated message, can the de-
62 fendant, in any event, be held to respond in damages beyond the amount paid to the company for forwarding the said dispatch.

4th. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rules is to govern in ascertaining the same? Are the damages merely nominal or is plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Chas. T. Hall, at Oil City, Pa., it being admitted that he did not make the purchase for the reason that, in his judgment, the price on the morning of November 10th, 1882, was too high to justify purchasing?

5th. Was the message so obscure and uncertain on its face
63 that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded?

6th. Was the service of the original notice in this cause a sufficient compliance with the clause in the contract providing that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message?" If not, is the right of recovery barred by the failure to present the claim in writing?

Wherefore said points of disagreement having been duly reduced to writing under the direction of said judges are ordered, together with the findings of fact to be entered of record, and to stand as a certificate of division of opinion in said cause, all being done at this May term, 1884, of said court.

(Signed) J. M. LOVE,
(Signed) O. P. SHIRAS,
*Judges.*

64 And on the 2nd day of June, 1884, a notice of attorneys' lien was filed in said cause in the words and figures following, to wit:

65 *Att'ys' Lien on Judg't.*

In the U. S. Circuit Court in and for the Southern District of Iowa.

GEO. W. HALL *v.* THE WESTERN UNION TELELGRAPH COMPANY.

The undersigned pl'ff's attorneys in the above-entitled cause claim an att'y's lien on the judgment in said cause for their services as attorneys in the bringing prosecution and trial of said cause for the sum of nine hundred dollars.

June 2, 1884.

(Signed) CROM. BOWEN &
WHITING S. CLARK.

Endorsed: Geo. F. Hall *vs.* Western Union Telegraph Co. Notice of att'ys' lien. Filed June 2nd, 1884. Ed. R. Mason, clerk.

66 And on the 19th day of June, 1884, a bond on writ of error was filed in said cause, in the words and figures following, to wit:

67 Supreme Court of the United States.

GEO. F. HALL *vs.* WESTERN UNION TELEGRAPH COMPANY.

Know all men by these presents, that the Western Union Telegraph Company as principal and John Wyman and W. E. Hazen as surety, all held and firmly bound unto Geo. F. Hall in the sum of thirty-six hundred dollars, to be paid to the said Geo. F. Hall, his executors or administrator. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated the 12th day of June, 1884.

Whereas the above-named Western Union Telegraph Company has prosecuted a suit of error to the Supreme Court of the
68 United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Iowa, central division.

Now, therefore, the condition of this obligation is such that if the above-named Western Union Telegraph Company shall prosecute its said writ of error, to effect and answer all costs, including just damages for delay and costs and interest on the writ and damages, if it shall fail to make good its plea then this obligation shall be void, otherwise to remain in full force and effect.

(Signed) WESTERN UNION TELEGRAPH COMPANY,
By WRIGHT, CUMMINGS & WRIGHT,
*Its Att'ys.*

JOHN WYMAN, *Surety.*
W. E. HAZEN, *Surety.*

Witness: A. B. CUMMINGS.

STATE OF IOWA, } ss:
*Polk County,* }

John Wyman and W. E. Hazen being duly sworn, each for
69 himself, says that he is one of the above sureties, and is a resident of Polk county, Iowa; that he has property in this State subject to execution of more than the value eighteen hundred dollars, and is worth over and above his liabilities the sum of thirty-six hundred dollars.

(Signed) JOHN WYMAN.
(Signed) W. E. HAZEN.

Subscribed and sworn to before me this 12th day of June, 1884.
[NOTARIAL SEAL.] (Signed) V. F. NEWELL,
*Notary Public.*

O. K.

WHITING S. CLARK,
*Pl'ff's Att'y.*

Approved.
[SEAL.] J. M. LOVE, *Judge.*

Endorsed: U. S. circuit court. Hall *v.* Tel. Co. Supersedeas bond. Filed June 19th, 1884. Ed. R. Mason, clerk.

70 And on the 19th day of June, 1884, an original writ of error filed in said cause, which is hereto attached and herewith returned, in the words and figures following, to wit:

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between George F. Hall, plaintiff, and the Western Union Telegraph Company, defendant, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of June, A. D. 1884.

[Seal U. S. Circuit Court, Southern District, Iowa.]

E. R. MASON,
*Clerk U. S. C. C., S. Dist. of Iowa.*

Allowed:
J. M. LOVE, *Judge.*

[Endorsed:] George F. Hall *vs.* Western Union Telegraph Company. Writ of error. Filed June 19, 1884. Ed. R. Mason, clerk.

72 And on the 25th day of June, 1884, an original citation was filed in said cause with the acceptance of service thereon, which said citation is hereto attached and herewith returned, in the words and figures following, to wit:

73 THE UNITED STATES OF AMERICA, *ss:*

To George F. Hall, Greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October, 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Iowa, central division, wherein the Western Union Telegraph Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 17th day of June, A. D. 1884.

J. M. LOVE, *Judge.*

Service of the above acknowledged this 20th day of June, 1884.
CROM. BOWEN &
WHITING S. CLARK,
*Att'ys for Def't in Error.*

[Endorsed:] United States circuit court, southern district of Iowa. George F. Hall *vs.* Western Union Telegraph Company. Citation. Filed Jun. 25, 1884. Ed. R. Mason, clerk.

74 United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause adjudicated in said court, wherein George F. Hall was plaintiff and the Western Union Telegraph Company was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error is hereto attached and herewith returned; and I also further certify that the original citation with acceptance of service thereon is hereto attached and herewith returned with this transcript.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Des Moines, in said district, this 6th day of September, A. D. 1884.

[Seal U. S. Circuit Court, Southern District of Iowa.]

E. R. MASON,
*Clerk U. S. Circuit Court, Southern District of Iowa.*

Endorsed on cover: S. Iowa, C. C. U. S. No. 85. The Western Union Telegraph Company, plaintiff in error, *vs.* George F. Hall. Filed 11th October, 1884.

124-427

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 85.

THE WESTERN UNION TELEGRAPH COMPANY,
*Plaintiff in Error,*

*against*

GEORGE F. HALL.

# BRIEF FOR THE PLAINTIFF IN ERROR.

WAGER SWAYNE,
RUSH TAGGART,
*Counsel for Plaintiff in Error.*

BURROWS QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

# Supreme Court of the United States,

OCTOBER TERM, 1887.

THE WESTERN UNION TELEGRAPH CO.,
Plaintiff in Error,

AGAINST

GEORGE F. HALL.

No. 85.

## Statement of the Case.

This case comes up by certificate of division of opinion. The questions relate to defendant's liability to plaintiff for want of care in the transmission of a telegram.

Plaintiff in error, defendant below, was sued for damages alleged to have resulted from failure to promptly and correctly deliver. The dispatch was received by defendant at Des Moines, Iowa, at 8 A. M., and was as follows:

To Charles T. Hall, Exchange, Oil City, Pa.:
Buy ten thousand, if you think it safe. Wire me.
GEORGE F. HALL.

The Exchange in Oil City was a species of Board of Trade, of which Charles T. Hall was a member. The

message was received at Oil City at 11 A. M. with the words "Charles T. Hall" omitted. It was delivered at 11:30 A. M. to the Exchange, but the officers of that concern refused to receive it. This fact was at once telegraphed to Des Moines, and at 6 P. M. a repeated copy of the message was delivered to Charles T. Hall, properly addressed. The Exchange was by that time closed for the day.

Had the message been delivered to Hall at 11:30 A. M. that day, he says that he would have thought it safe to buy, and would have bought. The price rose gradually from that time until the Exchange closed, and opened so high the next morning that he says that he did not think it safe, and did not buy.

The Court gave judgment for the plaintiff just as if he had bought, for the difference between the price he would have had to pay and that for which he might, the day before have bought.

The message was written upon one of the company's message blanks, which give notice of the likelihood of error in the transmission of dispatches, advised that all messages of any consequence should be repeated, offer to do so for one-half the original price, and stipulate that if this precaution is neglected the company's liability shall not exceed the sum received by it. A further stipulation is that all claims for damages shall be presented within sixty days. The first notice the company had of any claim for damages was this suit.

The Judges were divided upon the following questions:

Whether the cause of action was complete without such claim?

Whether the company could in any event be liable

for a greater sum, for error in transmission of an unrepeated message, than the sum named in the company's stipulation with the sender?

Whether, supposing it could be in any case so liable, the company, by assuming the duty of forwarding the message, became bound to the exercise of slight care, or to the exercise of ordinary care?

And, in this connection, whether the message was so obscure and uncertain that the defendant was not warned by the character of the message that loss would result from any failure to correctly and promptly transmit?

Whether, supposing none of these avoided the plaintiff's claim, the damages are merely nominal, or is plaintiff entitled to the difference between the price at which he would have bought had his message been delivered and the price at which he afterwards might have bought and did not?

A further question is embraced in the certificate of division which does-not arise upon the facts, but which seems to require special notice from the Court. It is numbered in the certificate as first question, and is as to whether the defendant can be heard to say that it was not bound to the exercise of *ordinary care* in the transmission of the message?

This case was not tried by a jury, but by the Court, on an agreed statement of facts. The Court says:

"We find the following as the material facts in the case" (Record, p. 15):

They thereupon proceeded to say concerning the message:

"The same being furnished and received by the defendant for the immediate transmission to Charles T.

Hall, at Oil City, Penn., the usual and ordinary charge therefor being paid by plaintiff, *through the negligence and want of ordinary care on the part of defendant's employee at Des Moines,* the message so received was forwarded to Oil City, Penn., in an imperfect condition," etc.

The stipulation of facts contains no admission of nor reference to any degree of care or want of it. On the contrary, it is expressly so framed as neither to require or admit of any findings of fact, but only conclusions of law. What it says with regard to transmission of the message is as follows:

"Stipulation of facts to be used in the trial of the above-entitled action.

"Defendants received plaintiff's message at their Des Moines office, Iowa, at 8 o'clock A. M., November 9th, 1882, for immediate transmission to Chas. T. Hall, as directed.

"The original message is annexed and made a part hereof, marked 'Exhibit A.' The plaintiff paid the defendant the usual charge for sending said message. On the receipt of said message by defendant's operator at their Oil City, Pa., office, at 11 o'clock A. M., November 9th, 1882, a part of the address had been omitted. The message as received by the operator at Oil City, Pa., is annexed hereto, and marked 'Exhibit B.'"

There is no testimony whatever as to how the omission occurred.

These are the facts, and from them the Court finds that through the neglect and want of ordinary care of the operator at Des Moines the name was omitted. Now, if such a conclusion is deemed by the Court as a matter of law to result from the facts, then it should be placed in the conclusions of law. As such, we think it should be considered by this Court, insist that such a conclusion not a proper one, and invite the Court's at-

tention to the question further along in our brief. Upon the question, however, further we venture to suggest that the parties having made an agreed statement of facts this Court should look to it to determine whether the action of the Court below was right or not. This case upon the record is similar to the case of Hartranft vs. Wiegman, 121 U. S., 609, where the finding of the jury having been treated by the parties as an agreed statement of facts, the Court considered the case upon its merits.

See also Ins Co. vs. Tweed, 7 Wallace, 44.
Mumford vs. Wordevell, 6 Wallace, 423.

## ARGUMENT.

### I.

**The suit in this case cannot be maintained without previous notice in writing, and that within sixty days after sending the message.**

The condition in the contract is explicit that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The contention of the defendant is that the evident meaning of this clause is to fix a time within which claims should be presented in writing, and that such presentation of the claim should be a condition precedent, without compliance with which the Telegraph Company is not liable

to an action. In other words, that giving notice of the claim within sixty days should be a condition precedent to any liability on the part of the company. If this be the proper construction and meaning of this language then it would follow that beginning a suit or action upon the claim would not be a compliance with it, because the suit must obviously be founded upon a pre-existing liability. To hold that the suit or notice of it brings into existence a liability, and at the same time is founded upon it, is absurd upon the face of it. The case differs from that of a demand note in that the liability of the company is made conditional upon the presentation of the claim in this case, while in the case of the note the demand merely fixes the time of payment of an acknowledged existing liability. In all cases where liability is made contingent upon the doing a certain thing, such thing is a condition precedent to the liability. Thus, in case of Bumstead vs. Insurance Co., 12 N. Y., 81, Justice ALLEN thus defines the effect of a by-law requiring notice of a loss to be given within thirty days after the fire.

"The plaintiff, as a condition precedent to his right to recover, was, by the by-laws of the company, bound to give notice forthwith of his loss, and within 30 days deliver in a particular account of such loss or damage, signed with his own hand and verified by his oath or affirmation, and also, if required, by his books of account and other proper vouchers, and by the conditions annexed to the policy, he was bound to furnish an inventory of all property destroyed or damaged, giving the value in cash of the damage sustained to each item—whether a building or other property—verified by his affidavit. The conditions are reasonable, and for the benefit of the insurers, to enable them to decide upon their rights and the extent of their liability before they are called upon to pay; and no liability attaches until

they have been complied with by the insured" (Morne vs. Harvey, 8 Exch. Rep., 819).

See also Roach vs. N. Y. & E. Ins. Co., 30 N. Y., 546.
Ripley vs. Ætna Ins. Co., 30 N. Y., 163.
May on Fire Ins., Secs. 5, 460 & 461.
Riddleberger vs. Ins. Co., 7 Wall, 390.

Similar clauses have long found a place in the contracts of carriers and have received the construction contended for by the defendant in the case at bar. Thus in the case of Express Co. vs. Caldwell, 21 Wallace, 264, the question involved was as to the effect of the requirement in the contract of an express company that "the company should not be held liable for any loss of, or damage to, the package whatever unless claim should be made therefor, within ninety days from its delivery to it."

Suit was brought after the ninety days and without any claim having been made, and Justice STRONG, discussing the case, evidently considers the presentation of the claim as a condition precedent to the right to sue. On page 268 he says: "It may be remarked, in the first place, that *the stipulation is not a conventional limitation of the right of the carrier's employer to sue.* He is left at liberty to sue at any time within the period fixed by the Statute of Limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim he may delay his suit."

See also Farnham vs. C. & A. R. R. Co., 55 Pa. St., 53.
Lewis vs. G. W. R. R. Co., 5 Hurl. & Norm., 867.

In the case of Wolf vs. The Western Union Telegraph Company, 62 Pa. St., 83, the validity and effect of this same stipulation was before this Court. In that case the message was sent October 23d, 1866, and the suit was brought December 13th, 1866, *just fifty-one days afterwards.* There was no written claim presented to the defendant, and one of the grounds of defense was that this condition had not been compelled with. Upon the trial in the Court below, the defendant presented the following point:

"The plaintiffs did not present their claims for damages in writing within sixty days after sending the message, as provided in the contract; therefore they cannot recover, and the verdict of the jury must be for the defendant." The Court adopted this point and thereupon a verdict was rendered in favor of the defendant. Upon appeal the judgment was affirmed by the Supreme Court, the evident construction of the clause by the Court and counsel being that the bringing of a suit within sixty days did not comply with the condition.

In the case of Cole vs. W. U. Tel. Co., 33 Minn., 227, the Court, *per* VANDERBURGH, J., say (p. 228):

"It cannot be contended that a regulation requiring the sender of a message to present his claim for damages in writing promptly to the company is an unreasonable one. Considering the character of its business, such regulation would be necessary for its own protection, and to enable it seasonably to ascertain the facts in the case, and to secure or preserve the proper evidence. It is not a regulation intended to shield the company from the consequences of neglect of duty on its part, put prescribing a duty to be performed by the plaintiff *before he should be able* to maintain his action." (Citing Wolf vs. W. U. Tel. Co., *supra*).

In the recent case of Western Union Tel. Co. vs. McKinney, 5 Tex. Law Rev., 173, the plaintiff failed to

present any written claim, but *brought suit within the sixty days limitation.*

The Texas Court of Appeals, speaking through WILLSON, J., say:

"It was not complied with by the appellee *unless the institution of this suit within the sixty days was a compliance therewith.* It was held by the trial judge that the suit was *equivalent* to a written claim for damages presented to the company. While this may be true, we do not think it was a compliance *with the stipulation* as to *this* action. *This stipulation was a condition precedent to appellee's right to recover any damages. Until* he had performed it, he had no cause of action."

See also

Young vs. W. U. Tel. Co., 65 N. Y., 163.
Heimann vs. W. U. Tel. Co., 57 Wis., 562.

## II.

**The admitted fact that a telegraph company has not promptly and correctly delivered a message which has been entrusted to it, does not by itself support a conclusion of negligence on the part of the company; but the plaintiff must also adduce proof in support of that conclusion. The proof requisite in the case of an unrepeated message must show the want of even slight care, and that the company has therefore been guilty of gross negligence or willful misconduct.**

The question of due care is to be measured in this case by the character of the undertaking of the defend-

ant. If it held out its instrumentality as reliable and accurate so that the sender could rely upon it under all circumstances, then the fact that the receipt of the message at Oil City with some words omitted might justly be held to warrant the inference that there was at some point in the transmission want of ordinary care. In the proposition which the defendant made for the carriage of messages, and which by the acceptance of the plaintiff thereby became the contract governing the parties in this matter, the Telegraph Company plainly notified the sender of the message of the unreliability of the instrument employed, in these words, "To guard against mistakes or delays the sender of a message should order it *repeated;* that is, telegraphed back to the originating office for comparison." Such liability to mistake in view of the agency employed is so well understood as to be judicially noticed and commented upon in some cases. Thus Judge CHRISTIANCY in discussing the case of Western Union Telegraph Company vs. Carew, 15 Michigan, 525, uses this language:

"But it would be extremely unjust, and considering the small amount of compensation for sending a message, would effectually put an end to this method of correspondence, to hold them absolutely liable as insurers for the entire correctness of all messages transmitted, or to hold them responsible for all damages which might accrue from an error, especially when only a single transmission, without repeating, is relied upon or paid for, or to deny them all power by rules, regulations or notices to limit their liability even in this case of repeated messages. And it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission."

"And while in settled weather, or when the normal condition or operation of the electrical currents is not affected by any temporary or local disturbance, a single

transmission by a skillful operator may be relied upon, as a general rule and for matters of comparatively small importance, yet it must be well known to most men (if not to all who have such a degree of intelligence as to be likely to resort to this mode of correspondence) that the electrical state of the atmosphere is liable to sudden and violent changes, extending over areas of greater or less extent, which cannot be foreseen or guarded against, and which materially affect the currents transmitted from a battery along the wires, and for a time render the operation of the instruments uncertain and unreliabie; that these disturbances often affect distant portions of the line or a connecting line, while their influence may be scarcely felt or not felt at all at the station from which a message is sent, and that therefore to insure entire and uniform correctness, the only safe method is to have the message verified by repeating it back to the station from which it was sent."

It is, therefore, in view of the above well-known facts, no evidence of want of care that a message is not delivered as received.

UPON THE QUESTION OF THE PROPER RULE OF DAMAGES to be applied in this case, the authorities fully bear us out in the contention that the only recovery which can be sustained is for the amount of tolls paid. If we are correct in the position that the regulation as to the consequences of sending a message without having it repeated is a reasonable regulation in view of the uncertainty of the elements employed in its transmission then it follows as a necessary consequenc that the plaintiff, knowing of this condition of affairs, and assenting to it by sending his message subject to such conditions, must now consent to be controlled by it in all respects in his recovery.

In the case of Express Co. vs. Caldwell, *supra*, this Court said:

"It is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with public policy."

And in Hart vs. Pennsylvania R. R. Co., 112 U. S., 331, this Court, in applying this test of reasonableness and consistency, has further said:

"The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight which he receives, and of protecting himself against fanciful and extravagant valuations."

That there is and ought to be no difference in this respect between a telegraph company and a common carrier, certainly no distinction against a telegraph company, seems to have been in effect already stated by this Court in Express Co. vs. Caldwell, *supra*, in which the Court says:

"Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent.

Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf vs. The Western Union Telegraph Company, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in *Young vs. The Western Union Telegraph Company.*"

It is well settled that telegraph companies are not subject to that rigid common law liability which attaches to common carriers as insurers of the goods which they have placed in their hands for transportation.

To hold telegraph companies as insurers of the safe delivery of every message intrusted to them would be, says Mr. Justice BREESE in the case of Tyler vs. W. U. Tel. Co., 60 Ills., at p. 428, " too rigid a rule."

There have been numerous decisions to this effect from which may be selected the following :

Grinnell vs. W. U. Tel. Co., 113 Mass., 299.
Birney vs. N. Y. & Washn. Tel. Co., 18 Md., 341.
Ellis vs. Am. Tel. Co., 13 Allen, 226.
W. U. Tel. Co. vs. Carew, 15 Mich., 532.
Schwartz vs. A. & P. Tel. Co., 18 Hun., 157.
Breese vs. U. S. Tel. Co., 48 N. Y., 132.
Pinckney vs. Tel. Co., 19 S. C., 71.
*See also,* Lawson on " Contracts of Carriers," p. 3.
Hart vs. W. U. Tel. Co., 66 Cal. 579.

Passmore vs. W. U. Tel. Co., 78 Penn. St., 238.
Aiken vs. W. U. Tel. Co., 5 S. C., 358.

Says Mr. Chief Justice GRAY in the leading case of Grinnell vs. W. U. Tel. Co., 113 Mass., 301 :

" The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves ; the identity of the goods received cannot be mistaken ; their value is capable of easy estimate and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly ; and his liability in damages is measured by the value of the goods. A telegraph company is entrusted with nothing but an order or message which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake ; which cannot be the subject of embezzlement ; which is of no intrinsic value ; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes ; which may be wholly valueless if not forwarded immediately ; for the transmission of which there must be a simple rate of compensation ; and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself."

The precise point in question, viz.: that the Telegraph Company can be held liable only for gross misconduct or culpable negligence, was expressly held in the following cases, and is indicative of the weight of authority :

McAndrew vs. Electric Tel. Co., 17 C. B., 3.
Breese vs. U. S. Tel. Co., 48 N. Y., 132.
Mann vs. W. U. Tel. Co., 37 Mo., 432.
Grinnell vs. W. U. Tel. Co., 113 Mass., 299.
Clement vs. W. U. Tel. Co., 137 Mass., 227.
Hart vs. W. U. Tel. Co., 66 Cal., 579.

Pinckney vs. W. U. Tel. Co., 19 So. Ca., 71.
Lassiter vs. W. U. Tel. Co., 89 N. C., 334.
Passmore vs. W. U. Tel. Co., 78 Penn St., 238.
U. S. Tel. Co. vs. Gildersleeve, 29 Md., 232.
Becker vs. W. U. Tel. Co., 11 Neb., 87.
W. U. Tel. Co. vs. Neill, 57 Tex., 283.
W. U. Tel. Co. vs. Carew, 15 Mich., 525.
White vs. W. U. Tel. Co., 14 Fed. R., 710.
Jones vs. W. U. Tel. Co., 18 *Id.*, 717.

In the leading English case of *MacAndrew vs. Electric Tel. Co., 17 Com. Beach, 3*, JERVIS, C. J. (p. 14), speaking of the stipulation, that "The company will not be responsible for mistakes in the transmission of unrepeated messages from whatever cause they may arise," says:

"So far from that being, as my Brother *Byles* suggests, an unreasonable qualification or limitation of the company's liability, it seems to me to be perfectly just and reasonable that means should be afforded to the company of ascertaining, by repetition, the correctness of the translation of the messages delivered to them for transmission."

Says CROWDER, J., in the same case (p. 15):

"The public have thus the opportunity of transmitting unimportant messages for a small charge; or, if it be matter of importance, they may, at a moderate additional charge, have the message repeated, and so obtain a certainty almost of its being transmitted with perfect accuracy. I see nothing unreasonable in that."

* * * * *

"This was the case of an unrepeated message, in the transmission of which one word has been, by mistake, substituted for another. That, it seems to me, is clearly a mistake within the regulation or condition in question; and that regulation not being, in my opinion, an unreasonable one, I concur with my Lord Chief-

Justice in thinking that the nonsuit in this case ought not to be set aside."

"The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages; and, according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate addition, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company."

*Grinnell vs. Western Union Telegraph Co., 113 Mass Regorts, at p. 302*

"On the other hand, the convenience of the opposite course is not less manifest. Instead of passing every message twice over the line, those only are to be repeated which from their importance demand peculiar care. And as the company cannot know what telegrams fall within this category, the question is referred to the person chiefly interested. Obviously, he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe—and, at all events, cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition. If it were not, the company would in all probability be called on to repeat every message, with the inevitable result of putting the public to an increase expense, without any corresponding gain.

*Passmore vs. W. U. Tel. Co., 78 Penn. St., 244.*

"The conditions are reasonable, and not against public policy; on the contrary, they subserve to carry out the objects for which telegraphic associations are created, and especially to secure the receipt of a message in the words in which it is written and delivered for transmission. A party using such a blank and writing his despatch thereon assents to the terms and conditions on which it is to be sent. If he omits to read or to become informed of them, it is his own fault. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information."

*Breese vs. W. S. Tel. Co., 48 N. Y., at p. 139.*

"At the trial the only proof given by the plaintiff to show negligence on the part of the defendant was the admitted fact that the message was delivered in its altered form." * * *

"With respect to the reasonableness of stipulations of the character of that under consideration we find upon careful examination that according to the weight of authority a regulation that the liability of the company for any mistake or delay in the transmission or delivery of the message, or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated by sending it back to the office which first received it and pays half the regular rate additional is a reasonable precaution to be taken by the company and binding upon all who assent to it so as to exempt the company from liability beyond the amount stipulated *for any cause except willful misconduct or gross negligence* on the part of the company, and we so hold."

*Hart vs. W. U. Tel. Co., 66 Cal., at p. 583.*

"The burden rests upon the plaintiffs in the case to maintain the issues which they present; that is, the burden rests upon the plaintiffs to show that this error or mistake occurred through the culpable negligence or gross carelessness of the operators or employees of the defendant company. It is not sufficient for them to say that there is a mistake which has occured in transmitting the dispatch to the office of the company in St.

Louis, but they must show that it occured through the gross carelessness and or culpable negligence of the employees of the defendant company. The defendant in this case, of course, denies this carelessness or negligence, and it further claims that it should be relieved from responsibility for the transmission of this dispatch because it was obscure." * * *

"The jury are instructed that in this case in no sense is the defendant to be held liable as a common carrier or subject to the rule governing common carriers; nor is the defendant to be held as an insurer of the correct transmission of the message; nor is the defendant liable for a failure to exercise extraordinary care, or failure to exercise even ordinary care and diligence in the transmission of this message, the same being an unrepeated message, and before the plaintiffs can recover any more than nominal damages herein, which is the price of sending the message, it is incumbent on the plaintiffs to establish by preponderance of the evidence that the defendant, it agents or servants were guilty of gross negligence or willful misconduct in its duty herein."

*Foster, J., charging jury in White vs. W. U. Tel. Co., 14 Fed. R. 715, 717.*

"It is sufficient to say that the weight of authority and the ablest and best reasoned cases establish the doctrine that the conditions contained in the blank on which the plaintiff wrote his message and to which he assented, are reasonable and valid to the extent of protecting the telegraph company from damages for any error or mistake occurring in the transmission of the message, unless it is shown affirmatively that such error or mistake was the result of gross negligence or fraud on the part of the company, and that mere proof of the fact that there is a mistake of a word or figure in the message is not sufficient evidence of negligence or fraud to render the company liable beyond the amount stipulated for in the contract of the parties."

*Jones vs. W. U. Tel. Co., 18 Fed. R., 718.*

"As we have already seen where such rules and regulations are in force, and the message is sent with reference to them, the company cannot be made liable beyond the amount received for sending the message, and

interest, except for injuries caused by gross negligence or willful misconduct on the part of its agents. And so the jury were told as shown by the instruction above quoted and others of like import."

"The eighth paragraph of the instructions is pointed out by counsel as specially objectionable and was in these words:

"*If there were such rules and regulations so assented to, the mere fact that there was an error in the message as delivered would not of itself, without further proof of carelessness, be sufficient to authorize the plaintiff to recover anything beyond the price of the message and interest thereon.*" There is no error in this instruction, which is fully supported by the authorities already cited. The jury did return a verdict in favor of the plaintiff for the sum paid by him for sending the message, which was all he was entitled to, gross negligence or willful misconduct being neither charged nor proved, and he being clearly subject to the rule or regulation by which the company restricted its liability to that amount."

*Becker vs. W. U. Tel. Co., 11 Neb., at p 94.*

WE SUBMIT that these cases fully disclose the established law controlling this feature of the case.

## III.

**Upon no hypothesis of negligence can the assessment of damages as made by the Court be sustained. Plaintiff has not sustained his contention that he has been injured to the amount of $1,800 as the direct natural result of the failure of the company to deliver this message as it was received.**

The stipulation of facts makes it entirely clear first that that purchase of 10,000 barrels of oil was contin-

gent upon the judgment of Charles T. Hall, as to whether he thought it was safe or not. Secondly, the profit of $1,800 was contingent upon the plaintiff's judging it best to sell the oil on the following day. As to the first, Charles T. Hall undertakes to say that he remembers he would have judged it safe to buy if he had received the message at a certain hour.

Perhaps he might have thought so at six o'clock that evening in the light of the events of the afternoon with oil rising all the time, but it is a sort of *ex post facto* wisdom to which but little value is to be given. But assuming that as true, and that he would have bought, as he says, for the plaintiff, even the plaintiff does not have the assurance to suggest that he would have had the wisdom to sell it again when so high. Perhaps he might, and perhaps under the stimulus of a rising market might have held on until it again fell to a lower price. However, the very fact that the making of the alleged loss required the interposition of a distinct, independent transaction, removes it, in a legal sense, from such connection with this occurrence as to make it a remote effect and not an immediate one. This test of directness of connection is given in the case of Milwaukee, etc., Ry. Co. vs. Kellogg, 94 U. S., 474, 475, where Justice STRONG thus states the tests:

"The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * We do not say that even the natural and probable consequence of a wrongful act or omission are in

all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

If the presence of an "intermediate cause, disconected from the primary fault, and self-operating, which produced the injury," be thus an effectual bar to a recovery based on the original fault, it seems to be equally clear and true that the absence of an "intermediate "cause disconnected from the primary fault and self-"operating," which was to produce the gain, and without which it could not be realized, should be just as effective when the action is not for loss incurred, but for profits which have not been made.

The same test is given by the Court of Appeals of New York in the leading case of Griffin vs. Colver, 16, N. Y., 489, where the distinction is very clearly stated, as follows, by SELDEN, J.:

"The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

"The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow *directly* and *naturally* from the breach of contract

is a mere mode of expressing the first; and that they must be not the *remote* but *proximate* consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

See also to same effect Masterton vs. Mayor, 7 Hill, 61.

The principles laid down in Griffin vs. Culver, certainly have full application to telegraph cases.

See Sutherland on Damages, Vol. 3, 298.

The precise question involved in this case is discussed in the case of Graham vs. W. U. Teleg'h Co., 1 Colorado, 230 (Allen's Telegraph Cases, 578), in which claim was made for profits which might have been made upon oils which he ordered by telegraph, his message not being delivered. His claim for profits he might have made had the oil been shipped, was entirely disallowed as not being a direct or natural consequence of the negligence complained of.

The case of Kiley vs. W. U. Tel. Co., 39 Hun, 158, is very much in point. There plaintiff sent the following unrepeated message to his brokers in Bradford, Pa.:

"Buy the twenty-five in to-morrow morning at best."

It appeared that this was an order to buy 25,000 barrels of oil at the market price, on margin. The message was never delivered. Plaintiff ordered the oil to be purchased to comply with the terms of a sale of that amount which he had made previously. Subsequently plaintiff purchased 25,000 barrels of oil for said purpose but the market had risen and he was obliged to pay more than he should have paid had the message been properly delivered. To recover the difference he sued the company; but it was held that, assuming that the dealings between the parties might be treated as

legitmate and recognized as valid, the plaintiff had failed to make a case for the assessment of damages and that his recovery should be limited to the message tolls.

Says BARKER, J., at p. 162:

"The message did not relate to the sale or transfer of any property owned by the plaintiff, and its non-delivery did not operate to diminish the value of or change the situation of any item of his estate. The claim that a case was made for the assessment of damages is based upon the idea that it was an offer to purchase, for the plaintiff insists that by the failure to deliver the message he lost an opportunity to purchase oil at the price established by the market on Monday morning, and before he was advised that the message had not been delivered oil advanced, and he seeks to recover of the defendant the advance in the price as his damages." * * *

"If a merchant on his way to a commission house with an intention of making a purchase of some of the merchandise there held for sale, at the price then placed upon it, and his arrival is delayed for a few hours because the carrier with whom he has taken passage has not kept his agreement, and the hour of his arrival is delayed, and in the meantime the goods which he intended to purchase have advanced in price, is it the law that in a suit against the carrier for a breach of his contract the latter is liable in special damages for the loss in profits which the merchant claims he has sustained because he failed to make a purchase of the goods at their price at the time when he should have arrived according to the promise of the carrier? Who can say that he would have made the contemplated purchase? It is true that he might have done so, but there is no certainty that he would have made and concluded a contract.

"This case is to be distinguished from a class of cases where the message was erroneously transmitted and its sense and meaning changed by an alteration, *and the party to whom it is addressed acts on its terms as delivered and thereby causes damages to the sender of the communication.*" * * * (p. 164).

"It is a cardinal rule on the subject of damages,

that one party shall recover all the damages he has sustained, occasioned by the breach of the contract by the other party. This rule is modified in its application, by two others. The damages which may be recovered, must be the natural and direct result arising from the breach of the agreement, and must also be certain both in their nature and in respect to the cause from which they flow. Under the rule thus qualified, speculative, contingent and remote damages which cannot be traced directly to the breach complained of, are excluded.

Applying these propositions in the cases as they arise, such damages are only allowed as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, and might naturally be expected to follow its violation. Under the rule thus formulated, we are of the opinion that the damages sought to be recovered in this case, were in their character uncertain and speculative."

*Beaupré vs. P. & A. Tel. Co., 21 Minn., 155*, was a case where plaintiff's merchants, in St. Paul, sent following message to a wholesale pork dealer in Dubuque: "Dispatch received. Will take two hundred extra-mess, price named." Defendant undertook to forward the message, but negligently delayed sending it three days, and did not inform plaintiff of the delay. At the end of that time plaintiffs were compelled to supply themselves at an advanced price; and sought to recover the difference from the Telegraph Company. It was held, however, that they could only recover the tolls, but no loss resulting from the advance in the price of pork, the damages claimed on this account not arising naturally from the breach of contract; and not being such as might reasonably be supposed to have been contemplated as the probable result of the breach.

Says YOUNG J., for the Court (p. 161):

"The message purports to relate to some business

transaction, the nature of which is not disclosed. It gives no intimation of the magnitude or importance of the business involved, or of the amount of damage that might result from a delay in transmitting it. The company might have known from the tenor of the message that it related to a purchase of goods, and was presumably of some value; but the message itself "will take 200 extra-mess, price named," would hardly have informed the defendant of the nature, quantity, price or value of the goods which the plaintiffs offered to take. The damage the plaintiffs might suffer from a rise in the market price of pork, if this message were not seasonably delivered, could hardly have entered into the contemplation of the defendant, at the time it received and undertook to transmit this message, as a probable consequence of the breach of its contract."

In the case of Lowery vs. W. U. Teleg'h Co., 60 N. Y., 198, this question of remoteness was under consideration. The message in this case asked that $500 be sent to the sender. By negligence the $500 was made to read $5,000. The $5,000 was sent and the sender of the message thereupon appropriated the money to his own use and absconded. In an action against the Telegraph Company brought by the receiver of the message for the $5,000, it was held that the negligence of the defendant was not proximately related to the loss, and, therefore, the defendant was not liable for such loss. The distinction contended for in the case at bar is very clearly put by ANDREWS, Judge, as follows:

"It is not easy, and it is probably impossible, to furnish any single test by which it may be determined in all cases, whether damages claimed in an action of tort are sufficiently proximate to authorize a recovery. They are considered too remote when, though arising out of the cause of action, they could not, in the ordinary course of things, be expected to have arisen, and do not flow naturally from the wrong. So, also, where

they have been immediately caused by the independent, willful or tortious act of a third person intervening between the misconduct of the defendant and the damage, if such intervening wrong could not naturally have been anticipated. * * *

The recovery allowed in this case cannot, I think, be maintained within the principles governing the liability of a defendant in an action for negligence. The mistake of the Telegraph Company was the antecedent of the loss sustained by the plaintiff, but it was not, in a judicial sense, the cause of it."

Now, applying the principles of these cases, we see that, in order to make out a case of loss to the plaintiff, two independent transactions must intervene between the negligence complained of and the claimed loss. The loss is wholly a speculative one in every sense of the word. The plaintiff did not lose any money on the intended purchase, because he did not make such purchase. He did not lose any money by buying subsequently, because of a rise in the price of oil, because he did not make such subsequent purchase. Had he on the next day made a purchase at the advance price, then he would have some foundation, not only in reason, but also in authority for the claim that the additional amount paid by him, was the amount lost by him in consequence of the defendant's negligence. Such is the case of Western Union Telegraph Co. vs. Wagner, 55 Penna. St., 262; but the principle of that case has no application to the case we are considering. So, also, the cases of Manville vs. W. U. Telegraph Co., 37 Iowa, 214; True vs. International Telegraph Co., 60 Maine, 9, and Western Union Telegraph Co. vs. Fenton, 52 Indiana, 1, in all of which the damages resulted directly from the negligent act of the defendant.

In still another aspect the assessment of the damages in this case is wrong. That is, that such a result could not be said to be in the contemplation of the parties to the contract. The general principles of compensation, in case of breach of contracts of this class as laid down in Hadley vs. Baxendale, 9 Exch., 341, are still applied. In many of the cases already cited this case is cited with approval. It certainly presents a rational principle by which to determine the extent of liability in the case of contracts, and as such is approved by most of the courts of this country, and may be said to fairly express the law. Now, it can scarcely be held to have been within the contemplation of the parties to this contract that Hall should judge it safe to buy this oil on this day and that the plaintiff should, on the following day, resell it, and in case of failure to convey this message as delivered that the defendant should respond as if all these things had been done. Upon this phase of the issue we have a valuable case in Sanders vs. Stuart, L. R., 1 C. P. D., 326, where the plaintiff claimed the right to recover commissions he would have earned upon an order to which the message related, and which he therefore lost by the neglect to send the message. Lord COLERIDGE, C. J., thus disposes of this branch of the case :

" The plaintiffs in this case were merchants in this country; the defendant a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message, in words by themselves, entirely unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The

defendant, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction. The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain the verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in Hadley vs. Baxendale, and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in Hadley vs. Baxendale applies, and that the damages recoverable are nominal only."

To same effect see cases cited before. Also,

Shields vs. Telgh. Co., Allen's Telgh. Cases, 5.

Kinghorne vs. Telgh. Co., 18 U. C., Q. B. Rep., 60.

Stevenson vs. Tel. Co., 18 U. C. Q. B., 530.

Landsberger vs. Telgh. Co., 32 Barb. (N. Y.), 530.

Baldwin vs. Telgh. Co., 45 N. Y., 744.

Beaupre vs. P. & A. Telgh. Co., 21 Minn., 155.

U. S. Telgh. Co. vs. Gildersleeve, 29 Md., 222.

White vs. W. U. Telgh. Co., 14 Fed. Rep., 716.

Smith vs. W. U. Telgh. Co., Ky. Ct. of Appeals, 1885, Vol. 20, Reporter, 240.

Pennington vs. W. U. Telgh. Co., N. W. Reporter, Vol. 25, 838.

McCall vs. W. U. Tel. Co., 7 Abb. New Cases, 151.

Hibbard vs. W. U. Tel. Co., 33 Wis., 558.

WAGER SWAYNE,
RUSH TAGGART,
Of Counsel for Plaintiff in Error.

124-444

DEC 8 1887
JAMES H. MCKENNEY,
CLERK

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

**No. 85.**

**THE WESTERN UNION TELEGRAPH COMPANY,**
*Plaintiff in Error.*

*against*

**GEORGE F. HALL.**

## Oral Argument of Wager Swayne, of Counsel for Plaintiff in Error, on the Validity of the Message Blank Stipulation, &c.

*Delivered November 30, 1887.*

BURGOYNE QUICK PRINTING CO., Cor. Walker & Centre Sts., New York.

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 85.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

GEORGE F. HALL.

**Oral Argument of Wager Swayne, of Counsel for Plaintiff in Error, delivered Wednesday, November 30, 1887.**

MR. SWAYNE said:

I regret very much, may it please your Honors, the absence of the counsel for the plaintiff, for the reason that the case itself, if it go beyond the technical point which lies at the threshold of the discussion, is one of very great consequence to the plaintiff in error, and while a very full brief has been filed for the defendant in error, I am conscious that the personal absence of his counsel ought to restrain me from so thorough a

discussion of the case as I should otherwise have been only too happy to present.

THE CHIEF-JUSTICE: No one appears on the other side?

MR. SWAYNE: No one is here present representing the other side. The counsel for the defendant in error wrote the clerk that he expected to be here, but he is not here. Indeed, in his letter he intimated some doubt about his being present.

The case comes here, may it please your Honors, upon a certificate of division from the Southern District of Iowa, and the issues presented by the certificate, while they are distributed among six enumerated questions, are in point of fact but three, the first of those being whether, under the circumstances of this case, the plaintiff had a right to sue; the second being whether or not, if the right to sue be presupposed, his recovery of damages should not be limited.

MR. JUSTICE MILLER: Who do you call the plaintiff?

MR. SWAYNE; The plaintiff below, may it please your Honor; he is the defendant in error. As I say, the second question is whether or not the plaintiff below, the defendant in error, if he had a right to sue. should or should not be limited as to the amount of the recovery by the fact of his signature to certain stipulations offered to him by the defendant corporation at the time of the contract upon which the suit is brought. And the third question is as to the measure of damages if the second one be answered in the negative.

The case relates to the liability of the defendant telegraph company for an error, which is admitted, in the transmission and delivery of a telegraphic message.

THE CHIEF-JUSTICE: An error in writing it?

MR. SWAYNE: Yes, sir; an error in writing. That is to say, it was written in one form and delivered to the Telegraph Company at Des Moines, Iowa, and it was received in another form, at Oil City, Pennsylvania, the precise character of the error being this: that whereas the original despatch read, "To Charles T. Hall, Exchange, Oil City, Pa.: Buy ten thousand, if you think it safe. Wire me. George F. Hall;" the message as received at Oil City, and as originally delivered read, "To Exchange, Oil City, Pa.: buy ten thousand, if you think it safe. Wire me. George F. Hall;" the Exchange in Oil City being a sort of Board of Trade, which had rooms and offices at a place where petroleum was daily bought and sold in large quantities, and where no other business was carried on.

MR. JUSTICE GRAY: I do not follow your statement quite in terms. The words were the same in each instance, but the person to whom the dispatch was addressed was different; is that the fact?

MR. SWAYNE: Yes, sir. A message was delivered at Des Moines, Iowa, to the Western Union Telegraph Company, addressed to Charles T. Hall, Exchange, Oil City, Pa., containing the language, "Buy ten thousand if you think it safe. Wire me." That message was received by the operator at Oil City in this form: "To

Exchange, Oil City, Pa.: Buy ten thousand, if you think it safe."

MR. JUSTICE HARLAN: Leaving out the name of Charles T. Hall?

MR. SWAYNE: Yes, leaving out the name of Charles T. Hall. The operator naturally supposed it was a dispatch addressed to the Exchange, and he immediately attempted to deliver it to that institution. They, however, refused to receive it. He thereupon telegraphed back at once the fact that the Exchange refused to receive it. The corrected desptch was then returned to him and was properly received and delivered to the person for whom it was intended.

By that time the Exchange had closed for the day, and by the next morning the price of oil had risen with a violent fluctuation, and the person to whom the despatch was addressed testifies that if he had received the despatch the day before he would have thought it safe to buy; but that the next morning, after this violent fluctuation had occurred, he did not think it safe to buy, and therefore did not do so.

Thereupon the Circuit Court proceeded to give him judgment, precisely the same as if he had bought, for the difference between the price at the time when the original despatch was received the day before, and the price at which ten thousand barrels of petroleum could have been bought when the corrected despatch was received, or as soon after the corrected despatch was received as it was competent to make the purchase.

MR. JUSTICE HARLAN: He sues, then, for the damages which he thinks equal to the amount which he would

have made if the telegraphic message had been sent correctly?

MR. SWAYNE: That is the way I put it, your Honor, but it is not the way it was put by the Court below. The way that matter appeared to me was, that when a man is debarred from making a purchase through the fault of another he is put in this situation: that he can either refrain from making the purchase, or he can buy at the higher price. If he buys at the higher price, I should be inclined to take that as *prima facie* evidence that the difference between the lower price and the higher price, was a just measure of his damages, because the alternative of buying at the higher price was considered by him less damaging than the alternative of going without.

But if he chose the other alternative of going without, that would be, to my mind, conclusive demonstration that damages for the amount for which he could have purchased were excessive, because he himself had preferred the other alternative and thereby disclosed that in his own judgment it was less damaging to go without than to buy.

Under these circumstances this case was submitted for trial by the Circuit Court, upon a stipulation at once waiving a jury and setting up the facts in full upon which the case should be tried. No testimony was adduced on either side, and the stipulation of facts, after setting out the sending and the receipt, and the subsequent delivery of the message, went on further to set out that the message had been delivered to the company written and signed upon one of the printed message blanks of

the company containing this stipulation, and I will ask the kind attention of the Court to it :

" Form No. 2. THE WESTERN UNION TELEGRAPH COMPANY :

" All messages taken by this company are subject to the following terms : To guard against mistakes or delays, the sender of a message should order it repeated ; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery or non-delivery of any unrepeated messages, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured ; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at following rates, in addition to the the usual charge for repeated messages, viz. : one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office ; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim

is not presented in writing within sixty days after sending the message.

" Send the following message, subject to the above terms, which are agreed to.

" To Charles T. Hall, Exchange, Oil City, Pa.: Buy ten thousand, if you think it safe. Wire me. George F. Hall.

" Read the notice and agreement at the top."

There are only two parts, may it please your Honors, of that stipulation with which we are here concerned, and the first one is that which is the final clause of the stipulation: " The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message."

What occurred in this case was, that no claim was ever presented to the company. But a claim against the company was presented to the Court by the commencement of a suit against the company within the period of sixty days, raising there the simple and direct question, the sender having signed the stipulation that there should be no claim against the company, or that the company should not be liable unless upon a claim presented to it in writing within sixty days, whether that stipulation was fulfilled by the commencement of a suit against the company.

The other part of the stipulation with which we are concerned is as follows:

" All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between

the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

Of course, if the Court held, as it did, that we were liable upon this message, which was an unrepeated message, beyond the amount received for sending the same, then the further question would arise, and did arise, for how much beyond the amount received for sending the same should we be liable, and as has already been elicited by one of the questions addressed to me by the Court, the Court below held that where we had hindered an order to purchase, or where we had delayed an order to purchase, and before the order was received the market price had risen, we were liable for the full amount of that increase in the market price although the party did not make the purchase at the advanced price.

MR. JUSTICE FIELD: I understand your position is that the company had a right to prescribe any terms upon which it would send a message.

MR. SWAYNE: No, your Honor; I would not by any means desire to go so far as that. On the other hand I would be equally clear of that antithetical position—the other extreme to which the Circuit Court went. I should be very clear of standing here to assert that the defendant corporation had the right to prescribe *any* terms upon which only it would send the message.

MR. JUSTICE FIELD: Any terms in regard to its own liability?

MR. SWAYNE: No, your Honor, not at all. I should be very clear of standing here to assert that the company had any right to prescibe any terms whatever as the conditions upon which it will transact business for the public. except such terms as would stand the judicial test of being just and reasonable. And I would be equally clear, and take the liberty of standing here with that intent, to contend against what I regard as that other extreme which was adopted by the Circuit Court, that there are no terms or conditions of any kind whatever which the Company has a right to prescribe as those upon which alone it will do business for the public.

THE CHIEF-JUSTICE: Your contention, as I understand it, is that this provision is a reasonable proposition?

MR. SWAYNE: Exactly.

THE CHIEF-JUSTICE: And that they entered into the contract because the message was signed under it?

MR. SWAYNE: That is precisely it. That is the precise question.

MR. JUSTICE GRAY: In order to follow the effect of your statement then, if I understand you, provided this plaintiff had had the message repeated and paid a half price more for doing it, then——

MR. SWAYNE: Then I would not be here, neither would he, for we would have had no quarrel.

MR. JUSTICE GRAY: But suppose there had been such a loss to him?

MR. SWAYNE: Then, I say, he would not be here; he would have been at our cashier's desk long since.

MR. JUSTICE FIELD: Yet your very conditions prescribe how much he shall receive under those circumstances.

MR. SWAYNE: Yes, for an unrepeated message.

MR. JUSTICE FIELD: But for the non-delivery of a repeated message.

MR. SWAYNE: There is a limitation for the non-delivery of any repeated message; but, may it please your Honors, I am not here to argue that. There are three grades of liability there acknowledged by the company. For error in the transmission of an unrepeated message, they confess their liability to rescind the contract and pay back what they have received. For error in the transmission of a repeated message, they acknowledge their liability for fifty times the amount received. For error in the transmission of an insured message they acknowledge their liability for the full amount of the stipulated sum.

I am not here, and may it please your Honors, I conceive that you are not here at this time, for the consideration of anything but the simple question presented by this case, which is wholly comprised within the first of

these stipulations : *what is the liability of the company in the case of error in the transmission or delivery of an unrepeated message ?*

MR. JUSTICE MILLER : I do not know myself whether the argument goes that far, but is it not rather a question whether it was a mere error which could have happened consistently with diligence and care on the part of the Company (that is one view of the subject) against which they may have guarded by this contract ? Is it not the question after all which has been presented before us lately, once or twice, whether a corporation or anybody else can contract against their own carelessness ?

MR. SWAYNE : May it please your Honor we shall see what is the precise question when we come to it.

MR. JUSTICE MILLER : That is the question I suppose. But at the threshhold of the stipulation lies that feature of it which prescribes that the company shall not be liable to suit except upon a claim first presented in writing within sixty days from the sending of the message.

MR. JUSTICE FIELD : Is that in the stipulation ?

MR. SWAYNE : Yes, sir ; it is in the stipulation. That is the feature of it with which we are first, I think, particularly concerned. Your Honors will find it on page 16 of the record, at the close of the stipulation, " The Company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message."

That, of course, is only a recognized counterpart of

the familiar stipulation in policies of insurance and in contracts of carriers, which has had abundant, repeated and time-honored recognition by this Court, in common with all other Courts, as I believe.

MR. JUSTICE HARLAN : I understand that no demand was made in this case within the sixty days ?

MR. SWAYNE : No, sir. No demand was made within sixty days, unless your Honor shall conceive that a demand was made within the terms of that stipulation by the commencement of a suit within the sixty days. This Court is on record time and again as holding that where there is a stipulation of that kind in a policy of insurance, and there is neither presentation of the claim in writing within sixty days, nor yet a commencement of a suit within the sixty days that where neither of these is presented the action is barred.

This Court is on record, as I conceive, in common with all other Courts on that question. But this Court is not on record upon the further question as to whether the stipulation for the presentation of the claim in writing is satisfied by the commencement of a suit within the sixty days. And that, I submit respectfully, is not an idle question because there are judgments of Courts of last resort on either side in more than one of the States of the United States.

MR. JUSTICE FIELD : On both sides, do you say ?

MR. SWAYNE : Yes, sir : on both sides.* I desire to

* The views of the law on this point contended for by the defendant in error may be found illustrated in the case of Smith vs. R. R. Co., 56 Iowa, 721.

be frank with the Court, and the more so because of the absence of counsel on the other side. I suggest to you that there is more than one of the States which, by the judgment of its Court of last resort, is committed as to its jurisprudence to either side of that question ; and the question now before your Honors is as to what shall be the position of this Court, and with which of these two classes of authorities this Court shall side. That I conceive is not an idle question.

For instance, the Texas Court of Appeals decided the other day with regard to this stipulation that

> " It was not complied with by the appellee unless the institution of this suit within the sixty days was a compliance therewith. It was held by the trial Judge that the suit was equivalent to a written claim for damages presented to the Company. While this may be true, we do not think it was a compliance with the stipulation as to this action. This stipula- was a condition precedent to appellee's right to recover any damages. Until he had performed it he had no cause of action."

MR. JUSTICE MILLER: What was the contract in that case ?

MR. SWAYNE: It was the same identical contract. It was a suit against the Western Union Telegraph Company.

MR. JUSTICE MILLER: Was that a suit against the Company ?

MR. SWAYNE: Yes, sir; a suit against the Company upon this same message blank. And now, in the presence of those conflicting authorities, the question arises as to what position with regard to that question

shall be taken by this Court. And at the threshold of that inquiry a glance at the position of this Court, so far as it may have approached a decision of that question, seems to me entirely pertinent, as it may supply to us perhaps nearly all of the light that we require upon the subject.

In the case of Wolf vs. The Western Union Telegraph Company, in 62 Pa. State Reports, page 83, there was a like stipulation—this identical stipulation—and the plaintiff there began his suit *fifty-one* days after the sending of the message, or *within the sixty days stipulated.* The point was made for the Western Union Telegraph Company that that was not a compliance with the stipulation, which apparently required, or was construed to require, that the claim should be presented to the company and should not be presented to the Court against the Company. And the judgment of the Court of Common Pleas upon that point was sustained by the Supreme Court.

That case of Wolf vs. The Western Union Telegraph company is copiously cited by this Court in the case of Caldwell vs. Express Company in 21 Wallace, at page 264, and there this Court made use of this language, which I will read in a moment. Your Honors will observe that in laying down the law with regard to the powers of express companies, the Court in this case has taken up the case of telegraph companies as an illustration, and, referring to the case of Wolf vs. The Western Union Telegraph Company, this Court said:

> Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for

the consequences of their own negligence. But they may by such contracts, or by the irrules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in Wolf vs. The Western Union Telegraph Company, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form."

That is the language of this Court, and they continue:

"The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in Young vs. The Western Union Telegraph Company."

THE CHIEF-JUSTICE: Is that case in your brief?

MR. SWAYNE: Yes, your Honor, it is.

MR. JUSTICE FIELD: Let me ask you one question. That is in the stipulation. Is that stipulation, which is binding as to some of its provisions, binding as to all? If there are some legal stipulations in that provision, would it be considered binding as to those, the same as it would not be binding in regard to those which are illegal?

MR. SWAYNE: I think it would. I think the lan-

guage of the message blank contains a series of stipulations.

MR. JUSTICE FIELD: To be considered separately?

MR. SWAYNE: Yes, sir; to be considered separately; and if there is any feature of the agreement which is contrary to public policy, that feature, I take it, according to the recognized rules of jurisprudence, is to be considered void, and the rest of it is to stand, unless the stipulation were of such a character that if one part be eliminated the whole must fall. That, I take it, is the ordinary canon of jurisprudence which is applied in cases where one feature of a written paper is regarded as under the inhibition of the law. The law is administered on the principle of *ut res magis valeat quam pereat*, and if there is a part which can stand without the rest, that part shall be allowed to stand. And in all the multitudinous decisions, both in England and in this country, upon that message blank, the contrary has never been assumed.

Now, may it please your Honors, with that I propose to leave this branch of the case. This Court in the case of the Express Company against Caldwell, from which I have read, used this very stipulation in this very message blank in connection with a general statement that the conditions must be reasonable—used this very stipulation from this very message blank as an illustration of what ought to be considered reasonable in such a case. And I take it that this Court, in the face of that decision, will not take an opposite ground without a thoroughness of enquiry to which I cannot on this occasion at all contribute.

Coming then to the next question (which is the question, in the judgment of my client, of great consequence presented by this case, and upon which, as upon the other question, I desire to say frankly, that there is a marked division among Courts of last resort in the several States of this country) we find that question to be, whether or not it is reasonable and just that a telegraph company, doing business for the public, shall first serve notice on the public that ordinary care, that is to say, such care as will insure, in ordinary affairs, with ordinary frequency, the accomplishment of the object in hand, requires that messages should be repeated? In other words that in regard to transactions by telegraph, that degree of security which men of ordinary prudence exact respecting affairs of common life, requires that messages should be repeated. Having given that notice, the company offers to repeat the message for one-half the orginal price, and requires the sender to stipulate that if he elects to dispense with that process of repetition he will, in the event of failure, be satisfied with damages to the amount paid by him, or with the rescission of the contract and the refunding of the amount paid. The question is whether that stipulation is a just and reasonable one.

If the Court please, I will state the question in the concrete. The Western Union Telegraph Company transmitted last year for the public, something over forty-seven million eight hundred thousand messages received on these blanks. It did that business for the public at an average cost to itself of 24¼ cents; and it charged to the public for that service, an average cost of 30¼ cents. In other words, the Western Union Telegraph Company transmitted last year for the

people of the United States and Canada, over forty-seven million eight hundred thousand messages for an average profit to itself of six cents per message.

It offered to every one of the senders of those messages to repeat such messages at an average cost of 15 cents per message for such repetition. That is to say, the Western Union Telegraph Company says to every one of its customers: "If you are content with an unrepeated message, we will receive and carry it under this stipulation for an average cost of thirty and a quarter cents, at a cost to us of twenty-four and a quarter cents. If you desire the message repeated, we will divide the cost of such repetition with you, and we will repeat the message for an average cost of fifteen cents," making the cost to the company of a repeated message 24¼ plus 24¼, or 48½ cents, and the average cost to the sender 30¼ plus 15¼, or 45½ cents.

That is to say, so great is our desire that parties whose messages are of consequence, should single them out and advise us of the fact, and give us an opportunity to repeat those messages, that we will do that business upon such terms that the total amount paid to us by the sender of a repeated message shall be slightly less than the total cost to us of that repeated message.

In other words, we will do the business of transmitting all important messages at cost if the parties sending them will be good enough to designate the fact that they are important, rather than incur the unavoidable liability to error which, from the very character and subtlety of the agent we employ and its other necessary conditions, attend the transmission of messages at large.

And the question before your Honor is, whether the Supreme Court of the United States shall coincide with the majority of the courts of last resort and with the courts of Great Britain, in leaving us at liberty to transact business with the people of the United States upon that plan, or whether the Supreme Court of the United States shall range itself with those minority decisions which hold, in so many words, as they put it in the course of their decisions, that we must judge at our peril whether or not we will repeat a message, and if we are of the opinion that common prudence requires that important messages should be repeated, we had better repeat them all*

MR. JUSTICE MATTHEWS: This contract does not insure correctness in the transmission of the message, even when it is repeated:

MR. SWAYNE: No, your Honor.

MR. JUSTICE MATTHEWS: It limits the liability to fifty times the cost of the message?

MR. SWAYNE: As to that, I have said that we are not here for the purpose of passing judgment upon that separate feature of the stipulation. I am not here to discuss the hypothetical case of error in the transmission of a repeated message.

THE CHIEF-JUSTICE: But is not that provision to be considered with reference to the reasonableness even, of this part of it?

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*For example of case so holding, see True vs. Int. Tel. Co., 60 Me., 9.

MR. SWAYNE: As I have said, there has been no single case in the United States or Great Britain, that I know of, in which this stipulation, considered as a whole, has not been dealt with on the principle of *ut res magis valeat quam pereat*, and those parts to which your Honor has just now referred been considered as separate features of the stipulation. I cannot cite authorities upon that question because it has never been urged.

MR. JUSTICE FIELD: Then parties sending such a message are presumed to assent to the whole stipulation? I understand the rule which prevails in such cases. But in this case, if there are illegal provisions in it, and a party says he will not sign it, and does not recognize it as binding, can you hold him under it because he is obliged to send his message?

MR. SWAYNE: If he made that complaint, and if he refused to sign the stipulation for that reason, then we should be here upon that question.

MR. JUSTICE FIELD: He signs it in the sense that he sends his message.

MR. SWAYNE: It has been decided so many times by this Court in the case of express companies and carriers of every description, that when a party signs the message blank he assents to the conditions contained therein, that I need not enlarge upon that point. That I take it, is coextensive with English jurisprudence, and the question remaining is simply whether that part of the stipulation which we seek to enforce against him is void as contrary to public policy.

Now, may it please your Honors, we come next to the question addressed to me by MR. JUSTICE MILLER, as to whether this case does not come within the general proposition assumed to have been laid down by this Court, that a carrier, and possibly a telegraph company, cannot stipulate for exemption from the consequences of his own negligence ; that that is contrary to public policy, in regard to which I take it the learned Justice had directly in mind the case of Railroad Company against Lockwood (17 Wallace, 357).

MR. JUSTICE MILLER : Did you not also read from 21 Wallace that this kind of a company came within that principle ?

MR. SWAYNE : I did, your Honor, and I certainly have not meant to stand here and contend against that proposition. I have conceived, however, that because a carrier could not contract for permission to be negligent, it did not necessarily follow that he could not enter into a contract, if the contract itself were just and reasonable, which should *limit the consequences* of his negligence when tried by the measure of damages to be allowed.

And I had specially in mind there the case of Hart vs. The Pennsylvania Railroad Company (112 U. S., 331) decided by this Court, unanimously, I believe, in 1884 in which, after a learned view of the law upon that subject, and with a special reference to the Lockwood case, this Court has gone on to say that the precise question as to the right of a carrier to make a stipulation limiting the consequences of his negligence, and as to the extent to which he should be mulcted in

case of negligence, not only had not been decided but, in the language of this Court, the limitation as to value has no tendency to exempt from liability for negligence.

This Court went on to say that a limitation as to value was not only distinct from a limitation as to negligence, but that it had no tendency in that direction. "The limitation as to value has no tendency to exemp-"tion from liability for negligence. It does not induce "want of care. It exacts from the carrier the measure "of care due to every dealer."

MR. JUSTICE MILLER: That is not the sum to be recovered, but the value of the property carried.

MR. SWAYNE: Very well; the carrier is bound and responsible in that value for negligence. The Court say (p. 343):

"The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight which he receives, and of protecting himself against fanciful and extravagent valuations."

MR. JUSTICE BRADLEY: That was an exceptional case. It was a case covering racing horses, which have a fanciful value, and it was in reference to a special contract entered into at the suggestion of the person who had the property to be carried,—of the owner who presented the property to be carried. There are a great

many special circumstances about it, and in a special case like that, it may be out of the reason of the Lockwood case entirely. I think that was the way in which it was viewed by the majority of this Court—as an exceptional case.

MR. SWAYNE: The decision assumes to lay down the general principle. But be that as it may, it certainly is set down there that in a case which makes it reasonable, a carrier shall have the sanction of this Court in that view.

MR. JUSTICE BRADLEY: If a man presents articles of very great artistic value to a common carrier of goods and nothing is said in regard to their value to that common carrier, would he be liable, or ought he to be liable for that amount, for the fanciful price of the article? It may be a picture worth a hundred thousand dollars, or some frail article that could easily be destroyed by the jolting of a car. When such a thing is presented it is an exceptional case. It is not a case of ordinary merchandise carried, and it would be subject to exceptional rules. I do not think that the case of Hart against the Railroad was one which would be quoted as altering, and we did not understand it to be one altering, the case of Lockwood at all.

MR. SWAYNE: Neither do I. On the contrary, the Court declares in the language I have read, that it has no tendency to alter the rule in the Lockwood case. The rule in Lockwood was that a stipulation which tended to exempt the carrier from the consequences of his negligence was contrary to public policy; and the

language in the Hart case is that a stipulation such as is there considered *has no tendency to exempt from negligence*, and does not tend to induce want of care, and therefore cannot be said to even tend in the direction of infringing on that public policy which the Lockwood case was intended to announce and uphold.

MR. JUSTICE BRADLEY: I do not know. I do not speak for anybody else, but I suppose that that case is to be construed according to the circumstances.

MR. SWAYNE: And what we ask for our case, may it please your Honor, is that it likewise shall be construed according to its circumstances. We are dealing with an exceedingly subtle and mysterious agency, and the particular event to which we are constantly subjected by that agent is, if I may be pardoned the freedom of my explanation, that the operator at one end, finding his communication perfect, will begin to send his message, sending the word "to," for instance. Sometimes there will be a sudden break for a moment, the line will "splutter," as it is called, and in an instant, almost, it will resume, and a word or two will be left out, and unless the text of the message is such as to disclose that fact to the recipient, the operator at the other end, there is no human agency by which any intimation can be conveyed of that fact otherwise than by a repetition of the message.

Take this very case. This message was started from Des Moines. It went to Chicago, and there it was repeated. It went to Pittsburgh, and there it was repeated. It went to Oil City, and there it was received. Now somewhere along there the instrument said

"to Exchange," and when the operator got it at Oil City it read "To Exchange," a corporate body as found by the record, and a proper recipient of telegrams.

MR. JUSTICE BRADLEY: I do not suppose you attribute the omission of the name of Hall to any defect in the natural agent which your employees use, electricity. I do not suppose you attribute the omission of the name to any defect in the operation of electricity?

MR. SWAYNE: It was due to some casual break in the circuit.

MR. JUSTICE BRADLEY: If there is any defect in the operation of that agent from natural causes, such as the prevalence of a storm, even an electrical storm, known as such distinct from other storms, that would be, I suppose, an overruling accident. It might, perhaps, be considered amongst those causes which are attributed to the act of God; and there the defect of action of your agent, electricity, might well be pleaded as an excuse for not correctly transmitting the message. But I do not suppose anything of that kind is claimed in this case; I do not so understand it from the stipulation; I understand it to be the fault of the employees.

MR. SWAYNE: On the contrary, may it please your Honor, the stipulation of facts makes not the faintest reference to it. I will point out the page where your Honor can find it. I explained that, or tried to, in my brief. The case was tried upon a stipulation of facts

(there was no evidence), and the stipulation of facts will be found to begin on page 12 of the Record, and it is as follows :

"Defendants received plaintiff's message at their Des Moines office, Iowa, at 8 o'clock, A. M., November 9th, 1882, for immediate transmission to Charles T. Hall, as directed."

"The original message is annexed and made a part hereof, marked 'Exhibit A.' The plaintiff paid the defendant the usual charge for sending said message. On the receipt of said message by defendants' operator at their Oil City, Pa., office at eleven o'clock A. M., November 9, 1882, a part of the address had been omitted. The message, as received by the operator at Oil City, Pa., is annexed hereto, marked 'Exhibit B.'"

That is every word that there is in the stipulation of facts upon that subject.

MR. JUSTICE MILLER : You come here with a case on a certificate of division. The case also shows certain findings of facts by the Court on which that division arose. Now, can we go back of that to see what the testimony is ?

MR. SWAYNE : Certainly not. If your Honor's premise was correct, the conclusion would be inevitable. But your Honor's premise is precisely that to which I was endeavoring to direct an explanation. The case was presented to the Court upon a stipulation of facts, and it comes here on a certificate of division. Between that stipulation of facts (not evidence) and the certificate of division the Court interjects this proposition : "The Court finds the following as the material facts in the case," and starts off with a statement.

MR. JUSTICE MILLER: Our suggestion was that this Court cannot go back of that finding of facts even as you have read it. It was for that Court, not this, to infer whether there was negligence or not, and they made that inference as a fact of their own on which they predicate these questions. Now, to go back and ask us to look at that testimony to see whether that was justified, and whether the circumstances were as stated is asking us to do that which we cannot do.

MR. SWAYNE: Perhaps I ought not to endeavor to induce your Honor to consider my position.

MR. JUSTICE MILLER: I would rather you would go on.

MR. JUSTICE HARLAN: Is there any difference in substance between the stipulation, in fact, and the facts found by the Court?

MR. SWAYNE: There is precisely this difference: That in it there is a statement which that Court never meant for a stipulation of facts, which is not a stipulation of facts, and which, as I conceive, it is the duty of this Court to disregard as not a part of the record. Because if this case were here with that stipulation of facts and the certificate of division, this Court would have all that is requisite for its judgment.

When a case is tried upon a stipulation of facts, it is not competent for the Circuit Court to find other facts, nor to find its view of the facts. And there could not be a better illustration of that than just this thing. These two lawyers sat down there, counsel familiar with the case, and they carefully prepared a stipula-

tion of facts which left for the Court nothing but conclusions of law, and the Court undertook to preface its certificate of division with a statements of its own, and the very first thing that it does is to say that the mishap occurred through the carelessness of the operator at Des Moines, when there is nothing in the record to show that there was an operator at Des Moines, except that he received the message. And that is the precise question.

I saw a case this morning in which this Court said that to allow a Circuit Judge, where there had been a stipulation of facts, to present a new set of facts as his own, as the basis of judgment, would be to put the parties in the power of the Court in a way in which this Court does not mean to do.

And the position taken here now is, that after we have agreed upon a stipulation of facts, our case shall come up here for judgment on a certificate, upon a basis of other facts to which we have not agreed.

THE CHIEF-JUSTICE: The difficulty is that you present a certificate of division, and we can only consider that certificate, and if that is a certificate of the facts they found, that is a misfortune to you which we cannot go behind.

MR. JUSTICE MILLER: You could not get a review of this case unless the Judges made a statement of what they differed upon.

MR. SWAYNE: Suppose they had left out the statement, and said, "We find as follows."

THE CHIEF-JUSTICE: That would have been another case.

MR. JUSTICE MILLER: The first thing is, are you permitted on this statement of the Judges to say that you are not responsible for negligence? How could that question arise unless the Judges say there was negligence?

MR. SWAYNE: Very well, I will not contend over that point; I will let it go. I was not unaware of the relation, but I did conceive that when there was here a certificate of division and a stipulation of facts, that the preamble to the decision was not in the case.

THE CHIEF-JUSTICE: There is nothing in this record to show that that stipulation was all the evidence there was.

MR. SWAYNE: Oh, yes, sir.

THE CHIEF-JUSTICE: We did not see it. But whether that be so or not, the only thing we can consider on this point is that which is connected with the certificate of division.

MR. SWAYNE: I certainly will not weary your Honor any further with that point. I am here to save your Honor's labor, and not in the remotest sense for the purpose of contending.

Going back, then, may it please your Honors, to the question of the message blank, we have this stipulation, which, as I have said, has been the subject of very frequent adjudication in this country and in

England. In England, as a matter of course, the decisions are all one way, and they uphold the stipulation.

In this country the decisions in the great majority of the States are to the same effect, and the progress of this Court towards a concurrence with those same decisions is disclosed by a review of its jurisprudence, beginning with the proposition cited in the Caldwell case that it is a competent and reasonable stipulation that the Telegraph Company may insist that it shall be liable only upon a presentation to it in writing of the claim made, within sixty days.

Next after that, this Court go on and in the case of Hart against the Pennsylvania Railroad Company, they draw attention to the distinction between an agreement for immunity from negligence and an agreement for limited liability in that case ; and they carefully announce that they do not mean to ignore that public policy which inhibits contracts for immunity from negligence, but that they call attention to the fact that they do not regard a limitation of the liability as even tending to induce negligence or operative in the way of immunity therefor. They lay that down as a fundamental distinction of public policy, and that is the unanimous voice of this Court.

And that leaves only the question whether there is such a difference between a telegraph company and a common carrier that a telegraph company may not stipulate for a limitation upon its liability for negligence, first ; and second, if it be conceded that a telegraph company may stipulate in the case of an unrepeated message, for a limited liability in case of negligence, then whether the stipulation or limitation

insisted on in this case is an unreasonable degree of immunity or limitation of value to this plaintiff.

Upon the distinction between a telegraph company and a common carrier, I do not know where I can find it any better expressed than in the case of Grinnell vs. The Western Union Telegraph Company in 113 Mass. Reports, where the Court say—and in so saying they are in conformity with the great bulk of Americans authorities:

"The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received cannot be mistaken; their value is capable of easy estimate and may be ascertained by inquity of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is entrusted with nothing but an order or message which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver which has no relation to any value which can be put on the message itself."

And upon that distinction it has been held again and again, that a telegraph company is not to be held to so strict a liability as an ordinary common carrier, because it has not the same ample measure of control, nor is its control at any time or in any degree in the nature of custody, and so admitting of guardianship, nor is it at

any time, in any degree or in any sense exclusive. It is not in such shape that any effectual precaution can be taken for detecting its absense. Nothing can do that except a repetition of the message.

And hence it is that in England and in this country, so far as I know, all telegraphy, from the beginning, so far as done by private parties, has been done under this same condition, that there should be a limited liability in case of every unrepeated message, and that the telegraph company might properly throw upon the sender, with due notice, the burden of taking the precaution that his message be repeated.

That leaves open another phase of the question which requires to be discussed, and particularly in view of what has been said and the disclosure of my own error in supposing that this case was to be heard upon the stipulation of facts signed by the counsel, and not upon a different stipulation presented by the Judges. And that question is this, that if we regard the finding of the Judges as the sole basis of this case upon which these certificates are to be reviewed, then we must take it, I suppose, as conclusive from both aspects; and the finding of the Court is that the failure to deliver this message correctly the first time was owing to the want of ordinary care on the part of the telegraph company.

I take it that I need not here at all enlarge, and I shall not, upon the tendency of Courts in these days to the position taken by this Court in the same direction; that, whereas, there have been heretofore two antithetical classes of cases, one degrees of care, and the other degrees of negligence; that the classification of degrees of negligence shall be henceforth discarded, and

all cases turning upon questions of that character shall be stated in terms of degrees of care.

The Court here held (the Court below, and conclusively for the purposes of this hearing) that there was, on the part of the defendant, a want of *ordinary care.* There is a great mass of authorities presented on my brief, holding, everywhere, that *a telegraph company is not bound like a carrier to the exercise of ordinary care.* A carrier, as we know, is bound always to *ordinary* care. He is not bound to the exercise of what is technically termed *great* care, but he is always bound to the exercise of what is termed *ordinary* care.

This Court has found that the defendant in this case was wanting in ordinary care, and the question arises there, whether a telegraph company, like a carrier, is liable in the case of want of ordinary care. The great majority of the authorities, as I have said (all of those authorities which do not, in express terms, charge upon the telegraph company that it must repeat all messages or neglect to do so, at its peril), make just that distinction between a telegraph company and a common carrier; that it is not bound, like a common carrier, to the exercise of ordinary care.

And the reason I urge and desire to press that point upon the attention of the Court is, to point out that I do not conceive, from the study of those authorities, that they at all mean to suggest that a telegraph company is less bound than a carrier to the exercise of care; certainly I should not contend for that.

*What they do mean is that such a degree of care as is ordinary with carriers, because it will ordinarily induce to safety, and is therefore called ordinary care,*

*is not sufficient with a telegraph company ordinarily to induce the same result.*

*That is to say, that a telegraph company is bound to the same amount of care, looked at from the standpoint of care only, as is the carrier, but it is only extraordinary care on the part of a telegraph company which will ordinarily induce the same result. It is only extraordinary care on the part of a telegraph company which will insure that degree of safety which ordinary care will produce in the case of a common carrier, the difference between the two arising from an absence of custody and control on the part of the telegraph company.*

In this same case from which I have read, the Grinnell case, the Supreme Court of Massachusetts say:

"The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages; and, according to the weight of authority"—and I refer to this because I do not want to take up the time of the Court in summing up and massing all these cases, and I find here highly competent and disinterested judges of a court of last resort, upon a review of the cases summarizing the matter in that way———

"and, according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate addition, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, *for any cause except willful misconduct or gross negligence on the part of the company.*"

And the point upon which I desire to enlarge is, that

this regulation is inherently reasonable because it is in point of fact just what the common law in the absence of the regulation would impose. A carrier at common law is bound to ordinary care. A telegraph company at common law is bound only to the same degree of care as a carrier, which in the case of a telegraph company cannot be termed ordinary care, because it will not ordinarily induce a safe result.

And hence it is that the Courts in this country and in England so generally hold that a telegraph company is liable only for gross negligence or willful misconduct. And in order to put itself on the safe side, the telegraph company takes the precaution to notify all senders of messages that this is a business which exacts extraordinary care, and they go on further and specify in the concrete, what degree of extraordinary care the character of this business exacts of it. That to give ordinary safety to a telegraphic message it must have this extraordinary degree of care that the business should be done twice.

MR. JUSTICE HARLAN: In the case of the non-use of the ordinary blank, do the authorities hold telegraph companies responsible for gross negligence?

MR. SWAYNE: I can hardly say to your honor where there is a case on an unrepeated message. I know of one or two such, but they are cases where the party was shown to have knowledge of the usual stipulation and it was so found.

MR. JUSTICE GRAY: My recollection of the state of the authorities when that opinion was delivered in the

Supreme Court of Massachusetts is, that that clause was put in by way of exclusion, because the Courts had gone so far as to say that anything short of willful misconduct would not be sufficient.

MR. SWAYNE: There are cases, and particularly the Sweatland case, in 27 Iowa, in which the Court take the ground that the company could not stipulate against its own negligence.

MR. JUSTICE GRAY: To any degree?

MR. SWAYNE: Yes, to any degree. But they nevertheless support the stipulation, because it said that in the case of an unrepeated message the burden of proof to show gross negligence was upon the plaintiff. I have not been able to ground that case, nor any one of the multitude of cognate cases, upon any other hypothesis than that the mere failure of a message was not at common law even *prima facie* evidence of that degree of negligence which would make the company liable, and that the company would only be liable for the want of even slight care, slight care being, by judicial decision, in matters of telegraphy, the failure to repeat the message.

Be that as it may, I desire to impress the point that here we have a conclusive finding of this Court that there was a want simply of ordinary care, and there are a multitude of judicial decisions, including the Sweatland case from the same State Court, to the effect that in such a case the burden was upon the plaintiff to show, not the want of ordinary care, but, as

the Sweatland case calls it, gross negligence or the absence of slight care.*

I do not know whether I have made your Honors tired of this case, but there remains a point which it is my duty, however perfunctory, to dwell upon, and that is with reference to the measure of damages which was here allowed.

And I desire in that connection to call attention only to two cases, and I shall not trouble the Court with reading from them, and refer to them only as illustrating the law of damages as here involved in the way in which I understand it.

In the case of Kiley against The Western Union Telegraph Company, 39 Hun, 158, which is cited in my brief, and which was recently decided, not by a Court of last resort, but by a Court of very respectable character in New York, in a precisely similar case to this, judgment was based upon two grounds, which seem to me to have come more nearly stating the philosophy of damages than I have seen it elsewhere. The Court say, in the first place, that a man cannot recover damages for non-delivery of an order to purchase, because he has not in fact been damaged. And they put it upon this ground : *that no item of his estate has been in any degree made worth materially less.*

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*I find that I have misstated the exact view taken in the Sweatland case, where it was held *inter alia* that ORDINARY negligence only need be proven, though *the proof must, as I have said, be affirmative on the part of the plaintiff.* For the position erroneously assigned in the above argument to the Sweatland case, SEE the cases cited on pp. 14, 15 of my brief, which show the view of this quesion as taken by the majority of States.

MR. JUSTICE FIELD: Will you please state that again?

MR. SWAYNE: I will read it in the language of the Court; it is very brief. I read from page 23 of my brief, where the Court say:

"The message did not relate to the sale or transfer of any property owned by the plaintiff, and its non-delivery did not operate to diminish the value of or change the situation of any item of his estate. The claim that a case was made for the assessment of damages is based upon the idea that it was an offer to purchase, for the plaintiff insists that by the failure to deliver the message he lost an opportunity to purchase oil at the price established by the market on Monday morning, and before he was advised that the message had not been delivered oil advanced, and he seeks to recover of the defendant the advance in the price as his damages. * * *

"If a merchant is on his way to a commission house with an intention of making a purchase of some of the merchandise there held for sale, at the price then placed upon it, and his arrival is delayed for a few hours because the carrier with whom he has taken passage has not kept his agreement, and the hour of his arrival is delayed, and in the meantime the goods which he intended to purchase have advanced in price, is it the law that in a suit against the carrier for a breach of his contract the latter is liable in special damages for the loss in profits which the merchant claims he has sustained because he failed to make a purchase of the goods at their price at the time when we should have arrived according to the promise of the carrier?"

Now, I say that the view of the law is that the man is not damaged, because there is no proof of the damage of an item of his estate which is made worse than before. And on precisely that ground, as I understand it, Lord COLERIDGE, in the case of Sanders vs. Stuart, a leading English case, refused damages. It is cited on page 27 of the brief. The Court say:

"The plaintiffs in this case were merchants in this country—the defendant a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message, in words by themselves entirely unintelligible, but which could be understood by the plaintiff's correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendant, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction. The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain the verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in Hadley vs. Baxendale, and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in Hadley vs. Baxendale applies, and that the damages recoverable are nominal only."

Now, may it please your Honors, if I have done so much as to direct the attention of the Court to the importance of the case, I have not come here in vain. I am very sorry, indeed, that the other side was not present to give your Honors the benefit of a more thorough discussion and because of which, perhaps, I have been obliged to discuss it with the Court instead of with counsel. I do not know that it is at all in reason, but I would presume from my long experience of the kindness of the Court, to suggest that I may be allowed to send in to the Court the substance of what has taken place this morning for its consideration.

THE CHIEF-JUSTICE: I suppose there is no objection

to that. It has been taken down by your reporter, and there will be, I suppose, no objection to your submitting that.

MR. SWAYNE: There were one or two points raised this morning which are new to me, on which I would like to enlarge.

THE CHIEF-JUSTICE: All we can allow you to add will be to give us the stenographer's report of the whole argument as it is. If the gentlemen on the other side had been here they could have heard that and would have replied. I think you should confine your new brief to what has been said.

MR. SWAYNE: I expect to send to counsel on the other side the report of my argument. I thank your Honors for your attention.



Dec. 6, '87.—150.

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[redacted]

[redacted]

IN THE

# UNITED STATES SUPREME COURT.

**OCTOBER TERM, 1887.**

NO. 85.

| | |
|---|---|
| THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,* *vs.* GEORGE F. HALL. | *Error to United States Circuit Court, Southern District, Iowa.* |

CHAS. A. CLARK, CROM. BOWEN, WHITING S. CLARK,
*Attorneys for Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT OF FACTS.

This action was brought by the defendant in error to recover damages for negligence in the *transmission and prompt delivery* of a telegram directing the purchase of 10,000 barrels of petroleum at Oil City, Pennsylvania, on the morning of November 9, 1882. Judgment was rendered in the sum of $1,800 for the plaintiff in the court below, and the case comes to this court on writ of error upon the following

"FINDING OF THE FACTS AND CERTIFICATE OF DIVISION OF OPINION.

(Record, pp. 15, 16, 17 and 18.)

This case was submitted to the court, a jury being waived upon a stipulation setting forth certain facts admitted by the parties and also containing what certain persons would testify if called as witnesses.

The court finds the following *as the material facts* in this case:

The plaintiff, at 8 o'clock A. M., November 9, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraphic dispatches, at its office in Des Moines, Iowa, a message in the following form, and plainly written on one of the usual blank forms furnished by the company:

Form No. 2.

THE WESTERN UNION TELEGRAPH COMPANY.

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening *by negligence* or of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of this company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employé of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a

message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office—for delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

THOS. T. ECKERT, *General Manager.* NORVIN GREEN, *President.*

| *Receiver's No.* | *Time Filed.* 8 A. M. | *Check.* |
|---|---|---|

*Send the following message subject to the above terms, which are agreed to* 11–9 1882.

To Charles T. Hall,

Exchange,

Oil City, Pa.

*Buy ten thousand if you think it safe. Wire me.* GEO. F. HALL.

☞ READ THE NOTICE AND AGREEMENT AT THE TOP. ☜

The same being furnished and received by the defendant for immediate transmissal *to Charles T. Hall*, at Oil City, Pa., the usual and ordinary charge therefor being paid by defendant.

Through the negligence and want of ordinary care on the part of defendant's employé at Des Moines, the message so received was forwarded to Oil City, Pa., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Pa., at 11 o'clock A. M., November 9.

The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a Board of Trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 A. M. until 4 P. M.

The officers of the Exchange, or Board of Trade, refused to receive the dispatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the dispatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall, at 6 o'clock P. M., November 9, 1882.

Had it not been for the error in sending the dispatch, without including the name of Charles T. Hall, it would have been delivered to him at Oil City at 11:30 A. M., November 9, 1882.

The meaning of the dispatch was to direct Charles T. Hall to buy 10,000 barrels of petroleum, if in his judgment it was best to do so.

Had the dispatch upon its first receipt at Oil City, Pa., been promptly delivered to Charles T. Hall, he would, by 12 o'clock, M., November 9, have purchased 10,000 barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff.

When the dispatch was delivered to Charles T. Hall the Exchange was closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff.

At the opening of the Board next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase and hence did not do so. It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10, 1882.

The operator acting for the defendant had no other knowledge of the meaning or purpose of the dispatch than is to be gathered from the message itself.

The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the dispatch in question in the circuit court of Polk county, Iowa, the original notice being served upon the defendant on the 22d day of December, 1882. Under the statutes of Iowa, actions in

the courts of that state are commenced by serving an "Original Notice" which is signed by the plaintiff or his attorney and is addressed to the defendant. No summons or writ under the seal of the court is issued.

The notice in this case was addressed to the defendant, and after entitling the cause proceeded as follows:

"*To Said Defendant*—You are hereby notified that on or before the 22d day of December, A. D. 1882, the petition of the plaintiff in the above entitled cause will be filed in the office of the clerk of the circuit court of the state of Iowa, in and for Polk county, *claiming of you the sum of fifteen hundred dollars as loss and damages suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram*, as set forth in said petition, *on November 9, 1882, from the plaintiff to Charles T. Hall, at Oil City, Pa.*

And that unless you appear thereto and defend before noon the second day of the January term, A. D. 1883, of the said court, which will commence on the 2d day of January, A. D. 1883, default will be entered against you and judgment rendered thereon.

CROM BOWEN,
WHITING S. CLARK,
*Attorneys for Plaintiff.*"

No other presentation of the claim was made by plaintiff.

Upon the foregoing facts it is the opinion of the presiding judge that the law is with the plaintiff, and that he is entitled to judgment in the sum of $1,800, and it is so ordered as the judgment of the court.

The judges holding said circuit court and before whom said cause was tried, hereby certify that on trial of said cause they were divided in opinion, and were unable to agree upon the following questions of law arising in said trial and necessary to be determined in order to finally determine said cause, to-wit:

1. Can the defendant, having in the usual line of its business accepted said message from plaintiff for transmissal to the party named therein at Oil City, Pa., and having received its usual charges for such services, be heard to say that it was not bound to exercise ordinary care in transmitting the same, and that it is only liable to the plaintiff in damages in case of gross negligence on its part.

2. Under the contract legally existing between plaintiff and defendant, whereby the latter assumed the duty of forwarding said message, the same being an unrepeated message, was the defendant bound only to the exercise of slight care or to the exercise of ordinary care.

3. Under the contract legally existing between plaintiff and defendant whereby the defendant assumed the duty of forwarding said message, the same being an unrepeated message, can the defendant in any event be held to respond in damages beyond the amount paid to the company for forwarding the said dispatch.

4. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rule is to govern in ascertaining the same? Are the damages merely nominal, or is the plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Charles T. Hall, at Oil City, Pa., it being admitted that he did not make the purchase for the reason that in his judgment the price on the morning of November 10, 1882, was too high to justify purchasing.

5. Was the message so obscure and uncertain on its face that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded.

6. Was the original notice in this cause a sufficient compliance with the clause in the contract providing that 'the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.' If not, is the right of recovery barred by the failure to present the claim in writing?"

Wherefore said points of disagreement having been duly reduced to writing under the direction of said judges are ordered, together with the findings of fact, to be entered of record as a certificate of division of opinion in said cause. All being done this May term, 1884, of said court.

(Signed) J. M. LOVE,
O. P. SHIRAS,
*Judges.*"

It is to be observed that there is no finding of fact by the court below, as to the negligence or gross negligence of the company during the *seven hours* after the message was received at Oil City before its delivery to Charles T. Hall.

It is also to be observed that there is no finding of fact by the court below that the message was an *unrepeated* message.

The evidence is not presented by any bill of exceptions, and if it was, under well settled rules, the court would not examine the evidence to determine any question of fact.

## BRIEF.

### I.

SUFFICIENT FACTS ARE NOT FOUND AND STATED BY THE COURT BELOW UPON WHICH THE 1ST, 2D AND 3D QUESTIONS CAN BE BASED.

Unless this is clearly and distinctly done the questions become general, abstract, hypothetical and outside the case, and will not be answered by this court.

In *Daniels vs. Railroad Co.*, 3 Wall., 256, the court say: "The questions must be *separate and distinct, and each one*

*must be particularly stated with reference to that part of the case upon which it arose.* * * *

THE QUESTION MUST NOT BE GENERAL, NOR ABSTRACT, NOR A MIXED ONE OF LAW AND FACT. *If it is either* THIS COURT CANNOT TAKE JURISDICTION."

In *Havemayer vs. Iowa Co.*, 3 Wall., 304, the court say: "It is necessary that the question should involve a distinct legal point, and THAT SUFFICIENT FACTS SHOULD BE SET FORTH TO SHOW ITS BEARING UPON THE RIGHTS OF THE PARTIES."

In *Norris vs. Jackson*, 18 Wall., 127, the court say:

"This special finding has often been considered by this court. IT IS NOT A MERE REPORT OF THE EVIDENCE, BUT A STATEMENT OF THE ULTIMATE FACTS ON WHICH THE LAW OF THE CASE MUST DETERMINE THE RIGHTS OF THE PARTIES A FINDING OF THE PROPOSITIONS OF FACT WHICH THE EVIDENCE ESTABLISHES, AND NOT THE EVIDENCE ON WHICH THOSE ULTIMATE FACTS ARE SUPPOSED TO REST."

## THE FIRST QUESTION.

The finding of fact by the court below *ante*, p. 3 (record, p. 16) was that—

"*Through the negligence* and want of ordinary care on the part of defendant's employé at Des Moines, the message so received was forwarded *to Oil City*, Pennsylvania, in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted."

This is not a finding of fact on which the ultimate negligence or gross negligence of the defendant in the *transmittal and* PROMPT DELIVERY of the message can be predicated one way or the other.

All the intervening facts up to the time of the DELIVERY of the message must be considered to determine the ultimate negligence or gross negligence in the case.

The operator at Oil City might have called back instantly and procured the address, with no appreciable delay, and delivered the message accordingly. In which case the fact of the omission of the address in the first instance, would have made no appreciable difference in the prompt delivery of the message.

Any operator, not grossly and unaccountably stupid, receiving a message without any address, should have noticed, *at once*, the blunder, and called for its correction while in communication with the sending office.

But after the receipt of the message at Oil City, without any address, SEVEN HOURS were allowed to elapse before the address was obtained and the message delivered.

There is no finding upon all the facts up to the *delivery* of the message, as to the ultimate negligence or gross negligence of the defendant.

Without this finding as to the ultimate negligence, or gross negligence, the question becomes an abstract and general question outside the facts in this case, and cannot be answered.

Without this express and special finding, as to the ultimate negligence or gross negligence on all the facts up to the time of *delivery* of the message, the judgment must stand, because it inheres in the judgment that all the facts necessary to sustain it were found by the court below, unless the contrary appears from a special finding.

In other words, since there is no finding on all the facts up to the *delivery* of the message, that the defendant was guilty of negligence only, and not of gross negligence, it inheres in the judgment that the defendant was guilty of such negligence as is necessary to sustain the judgment, *gross negligence* if that is necessary, and the question becomes useless and outside the case. It is sufficient that there is no finding by the court below upon all the facts *up to the delivery of the message*, as to the negligence or the gross negligence of the defendant.

The court will look in vain for any finding of this sort covering the *transmission* and *delivery* of the message up to the end of the *seven hours* taken for its *transmission* and *delivery*.

THE 2D, 3D, 4TH AND 6TH QUESTIONS.

It is to be observed that the second and third questions are based on the *supposition* that the message was an *unrepeated* message. But the fact that it was an unrepeated message is nowhere *found and stated by the court below.*

The questions are hypothetically outside the facts found and stated by the court, and under well-settled rules will not be answered. It is also to be observed as to the second question in respect to "slight care," that there is no finding of fact on which this feature of the case can be considered. The observations in regard to the first question are applicable here. There is no finding as to the ultimate fact of negligence or slight or ordinary care, which was exercised by the defendant covering the *transmission* and *delivery* of the message.

It inheres in the judgment that there was a want of even slight care covering the transmission and *delivery of the message*, if that is necessary to sustain the judgment.

It is also to be observed that the third question, "Can the defendant *in any event* be held to respond in damages beyond the amount paid to the company?" contemplates asking the court as to the liability of the defendant as against even gross, willful or intentional neglect or fraud of defendant, and in this respect the question is outside the facts found and stated in the case by the court below.

It is quite likely there are other objections to these questions, and also objections to the other questions, which will prevent the court from answering them. If so, the court will, as we understand the practice to be, take notice of its own motion of such objections, and decline to answer the questions, where the objections are jurisdictional in their nature.

For instance, it may well be doubted or denied that either the fourth or sixth questions present a *distinct point* of law as required.

*Williamsport Bank vs. Knapp*, 119 U. S., 357, and cases therein cited.

The fourth question asks in effect, what is the rule of damages, not in respect to any well defined *point*, but generally on the whole case as presented in the extended evidential facts.

The sixth question is in the nature of a general demurrer to the facts found and stated in respect to the notice of the claim, without pointing out any ground or *distinct point* upon which the court is asked to determine whether or not the notice was sufficient.

## II.

IF THE QUESTIONS ARE ALL TO BE ANSWERED, THE ANSWERS WILL BE FAVORABLE TO THE DEFENDANT IN ERROR AND SUSTAIN THE JUDGMENT.

1. The first three questions may be grouped together for consideration.

The facts and questions have heretofore been given, *ante*, pp. 1 to 6 (record, pp. 15, 16, 17 and 18).

It is to be observed that the court below found and stated the fact, that the mistake in the message was "THROUGH THE NEGLIGENCE of defendant's employé."

As against the NEGLIGENCE thus found and stated by the court below:

Can the defendant be heard to say that it is only liable for gross negligence? The liability of telegraph companies in such cases is decisively established by the great weight of authority, notwithstanding the stipulations for exemption from liability for negligence.

*Birney vs. Tel. Co.*, 18 Md., 341.

*Tel. Co. vs. Gildersleeve*, 29 Md., 248.
*Baldwin vs. Tel. Co.*, 45 N. Y., 744.
*Breeze vs. Tel. Co.*, 48 N. Y., 140.
*Bartlett vs. Tel. Co.*, 62 Me., 209.
*Tel. Co. vs. Griswold*, 37 Ohio St., 301.
*Tel. Co. vs. Fenton*, 52 Ind., 1.
*Abraham vs. Tel. Co.*, 23 Fed. R., 315.
*Parks vs. Tel. Co.*, 13 Cal., 422.
*White vs. Tel. Co.*, 14 Fed., 710.
*True vs. Tel. Co.*, 60 Me., 9.
*Wann vs. Tel. Co.*, 37 Mo., 482.
*Candee vs. Tel. Co.*, 34 Wis., 471.
*Hibbard vs. Tel. Co.*, 33 Wis., 558.
*Thompson vs. Tel. Co.*, 64 Wis., 531.
*Sweatland vs. Tel. Co.*, 27 Iowa, 456.
*Manville vs. Tel. Co.*, 37 Iowa, 214.
*Tyler vs. Tel. Co.*, 60 Ill., 421.
*Tyler vs. Tel. Co.*, 74 Ill., 168.
*Railroad Co. vs. Lockwood*, 17 Wall., 351.
Wharton on Negligence, Sec. 763.
*Wolf vs. Tel. Co.*, 62 Pa. St., 83.
*Marr vs. Tel. Co.*, 1 R'y and Corp'n, L. J., 290. (Sup. Court Tenn., March, 1887) and S. W. R., 496.

The general ground upon which all these authorities proceed, in view of the public employment and character of telegraph companies, is that such stipulations for exemption from liability for negligence, leaves the telegraph company under no duty whatever to transmit and deliver the message; that such stipulations are not just and reasonable, and are void as against public policy.

A few citations from these numerous cases will sufficiently illustrate and emphasize the established grounds and reasoning upon which the limitation of liability for negligence is held to be unjust and unreasonable, and void as against public policy.

In *Binney vs. Tel. Co.*, 18 Md., 341, the court say that:

"Courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have stopped. *To permit them to contract against their own negligence would be to arm them with a most dangerous power; one indeed that would leave the public almost remediless.*"

In *Sweatland vs. Tel. Co.*, 27 Iowa, 451, Dillon, J., says:

"But I deny that companies can adopt general printed rules exacting as a condition of sending messages that the sender shall exonerate or release the company from damages caused by defective instruments or by the want of proper skill in the operators or by their *failure to use due care.*"

And as a conclusion of an exhaustive discussion covering the refinement between negligence and gross negligence, on p. 458, Judge Dillon says:

"On the other hand, if the operating agents of the company *did not use ordinary, usual and reasonable care* in transmitting the message, and if the want of care (and not atmospheric causes or the infirmities of telegraphing) *caused the mistake the company is liable.*

"But the plaintiff not having repeated the message, it is incumbent on him to satisfy the jury that the mistake was caused by the DEFENDANT'S NEGLIGENCE."

In *True vs. Tel. Co.*, 60 Me., 19, the court say:

"It is clear that a mere change of rates or prices cannot avoid legal liability. The duty and responsibility of the company cannot properly be measured by the price for the duty undertaken." * * * And on p. 21: "A rule or stipulation like the one in question, which covers all possible delinquencies, mistakes, delays or neglects in transmitting or in delivering or not delivering a message from whatever cause arising, is not for the reasons before

stated a reasonable regulation within the legal rule. Such a rule is not saved from these objections by the condition of a liability to repay if required by the sender, of the trifle paid to them. It is a mere evasion of legal liability, AND IS NEVER THE MEASURE OF DAMAGES FOR NON-PERFORMANCE OF A CONTRACT OF THIS KIND."

In *Bartlett vs. Tel. Co.*, 62 Me., 217, 218, the court say:

* * * "It would seem self-evident that the contract invoked in the defense is utterly void. * *

There can be no contract unless the contracting party assumes some responsibility, or undertakes to do or perform some act.

In this case the terms of the alleged agreement impose no duty whatever upon the defendants, or if they do, by the same instrument they are absolved from all such duty and relieved from all responsibility in regard to it.

To be sure they agree or propose to receive the message and send it by night, *but on condition that they may send that or another, or none whatever. The same act by which they undertake to do, relieves them from all obligation to perform.* Interpreting the several parts of the contract as one whole it imposes no undertaking to send the message, or if sent, that it shall go correctly."

In *Candee vs. Tel. Co.*, 34 Wis., 471, the court say:

"If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half the usual rates for sending day messages, that argument ends by proving that the company does not undertake to send the message at all, and that no contract or agreement on its part is made or entered into for that purpose.

If the company promises or binds itself at all for the rate or consideration named and which it is willing to and may accept, *then the smallness of the consideration cannot operate*

*to relieve the promise or destroy the obligation thus created.*"

In the recent case of *Thompson vs. Tel. Co.*, 64 Wis., 534, where the provisions at the top of the message were precisely the same as in this case, the court say:

"It is insisted that according to the terms of the contract signed by the plaintiff when he sent his message, the company is relieved from all liability to respond in damages to the plaintiff for any neglect or delay in forwarding or delivering the message beyond the repayment of the money paid to the company for sending the same.

Whatever may be the decisions of other courts in other states upon this question, we think the decisions of this court settle the question against the appellant.

*Candee vs. Tel. Co.*, 34 Wis., 471.
*Hibbard vs. Tel. Co.*, 33 Wis., 558, 568.

In these cases the telegrams were sent as night dispatches upon printed blanks of the company by the terms of which such messages were sent at half the usual rates for day messages 'on condition that the company should *not be liable for errors or delay in the transmission or delivery or non-delivery of such messages from whatever cause occurring*, and should only be bound in such cases to return the amount paid by the sender.' In both cases it was held that the contract was void, as against public policy so far as it undertakes to protect the company from liability for the negligence or fraud of its agents.

In the last case cited the present chief justice says, quoting the opinion in *Baldwin vs. Tel. Co.*, 45 N. Y., 751: 'While telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties and to answer for the neglect and omission of duty of their servants and agents'; 'and this degree of liability the law imposes upon

them as well in the transmission and delivery of a night as a day dispatch.'

Chief Justice Dixon, in the Candee case, says: 'Either the company enters into a contract with him (the sender of the message) and takes upon itself the burden of some sort of legal obligation to send the message or it does not. It would be manifestly against reason and what all must assume to be the intention of the parties, to say no contract whatever is made between them, and nobody, not even the officers or representatives of the company, assert such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender.'

We are quite satisfied with the decisions of this court above cited and with the reasons given to sustain them, and we believe they are in accord with the weight of authority in other courts.''

In *Railroad Co. vs. Lockwood*, 17 Wall., 357, where the verdict of the jury was based upon the finding of fact under the charge of the court, that the injury was caused by the *negligence* of the defendant, this court has obliterated the refinement as a practical distinction between negligence and gross negligence.

The discussion of this question in that case is general, not peculiar merely to the liability of the common carrier, but especially and fully applicable and pertinent in this case in view of the public service and character of telegraph companies.

This court, in the Lockwood case, say in conclusion, p. 382:

"The defendants endeavor to make a distinction between *gross* and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to perform that little, it is called gross negligence. If very great care is due and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, the failure to bestow that amount of care is called ordinary negligence. In *each case* the negligence, whatever epithet we give it, is failure to bestow the care and skill which *the situation demands;* and hence it is more strictly accurate, perhaps, to call it simply negligence."

* * * * * * *

The stipulation for exemption from liability for negligence having been held to be void, the court say further, p. 383:

"In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. *A failure to exercise such care and diligence is negligence.*

It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse for negligence in the performance of that duty, *then the company remains liable for such negligence.* The question whether the company was guilty of *negligence* in this case, which caused

the injury sustained by the plaintiff WAS FAIRLY LEFT TO THE JURY. IT WAS NOT NECESSARY TO TELL THEM WHETHER IN THE LANGUAGE OF LAW WRITERS SUCH NEGLIGENCE WOULD BE CALLED GROSS OR ORDINARY.

The conclusions to which we have come are —

*First.* That a common carrier cannot stipulate for exemption from responsibility when such exemption is *not just and reasonable* in the eye of the law.

*Secondly.* That it is *not just and reasonable* in the eye of the law for a common carrier to stipulate for exemption from responsibility for *the negligence of himself or his servants.*"

It is now to be especially observed in respect to the distinction involved in the first two questions between negligence and gross negligence, that the court below found and stated the fact that the mistake in transmission of the message was, "THROUGH THE NEGLIGENCE of defendant's employé." The precise point involved in the first two questions, therefore is this, where the court below has found and stated the fact that the mistake in the message "WAS THROUGH THE NEGLIGENCE OF DEFENDANT'S EMPLOYÉ," upon this finding of fact "can the defendant be heard to say" "that it is only liable to the plaintiff in damages in case of gross negligence on its part?"

This is the precise question which this court determined in *Railroad Company vs. Lockwood*, 17 Wal., 357.

In *Railroad Company vs. Lockwood*, 17 Wal., 384, the court say:

"*The question whether the company was guilty of negligence in this case which caused the injury sustained by the plaintiff* WAS FAIRLY LEFT TO THE JURY."

So that in the Lockwood case the finding of fact by the jury, on which the verdict and judgment rested, was precisely the same as in this case by the court below, that "the company was guilty of NEGLIGENCE."

In this situation, as the court say, on page 382:

"The defendants endeavor to make a distinction between gross and ordinary negligence, *and insist that the judge ought to have charged the jury that the contract was at least effective for excusing the latter.*"

That is precisely what is claimed in this case under the first two questions, that "the contract was at least effective for excusing" all but gross negligence, and this upon the precise situation in this case as in the Lockwood case, the finding of fact by the court in this case, that the mistake in the message "WAS THROUGH THE NEGLIGENCE OF DEFENDANT'S EMPLOYÉ," by the jury in the Lockwood case that "THE COMPANY WAS GUILTY OF NEGLIGENCE."

The result of the reasoning in the Lockwood case is conclusive of the result here.

It was sufficient that the court below found and stated the fact that the mistake "WAS CAUSED THROUGH THE NEGLIGENCE OF DEFENDANT'S EMPLOYÉ."

As against this finding of fact the defendant cannot be heard to say "that it is only liable to the plaintiff in damages in case of gross negligence on its part," as that is a refinement and distinction which this court does not recognize as substantial or valid.

In the recent case of *Telegraph Company vs. Griswold*, 37 Ohio, 301, the special stipulations were precisely the same as in this case, and the court below charged the jury, page 305, that if the "mistake occurred *through the carelessness and negligence* of the defendant, the special agreement set up in the answer did not relieve the company from liability otherwise resulting from *such negligence.*"

It is said by the supreme court, after discussion and citation of numerous authorities, page 312, "these authorities show a strong tendency in the adjudication to break down *the impracticable distinction* between what is termed gross negli-

gence and ordinary negligence which some cases hold to exist.

The rule, however, in this state, is well settled that one exercising a public employment is liable for failing to bring to the service he undertakes that degree of skill and care which a careful and prudent man would under the circumstances employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service is contrary to public policy, and consequently illegal and void. In our opinion telegraph companies fall within the operation of this rule, and that in failing to exercise such care and skill in the transmission and delivery of messages they become liable for the resulting consequences, notwithstanding their stipulations to the contrary." Citing—

*Railroad Company vs. Lockwood*, 17 Wall., 357.

In *Hart vs. Penn. R. R. Co.*, 112 U. S., 338, this court said:

"It is the law of this court that a common carrier may, by special contract, limit his common law liability; BUT THAT HE CANNOT STIPULATE FOR EXEMPTION FROM THE CONSEQUENCES OF HIS OWN NEGLIGENCE OR THAT OF HIS SERVANTS." Citing—

*New Jersey S. Nav. Co. vs. Bank*, 6 How., 344.
*York Co. vs. Central R. R.*, 3 Wall., 107.
*Railroad Co. vs. Lockwood*, 17 Wall., 357.
*Express Co. vs. Caldwell*, 21 Wall., 264.
*Railroad Co. vs. Pratt*, 22 Wall., 123.
*Bank vs. Adams Express Co.*, 93 U. S., 174.
*Railway Co. vs. Stevens*, 95 U. S., 655.

But in this case the shippers of the horses accepted the "AGREED VALUATION" of "not exceeding $200 each," as "just and reasonable." The court on this feature of the case said, page 341:

"The *subject matter* of a contract may be *valued*, or the damages in case of a breach may be liquidated in advance. In the present case the plaintiff accepted the *valuation* as 'just and reasonable.'" * * * On page 343: "*The distinct ground of our decision in the case at bar* is that where a contract of the kind signed by the shipper is fairly made, agreeing on the *valuation of the property* carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the *agreed* VALUATION, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible, and the freight he receives, and of *protecting himself against* EXTRAVAGANT AND FANCIFUL VALUATIONS."

The essential basis of upholding the limitation as to the *valuation of the property* in the Hart case does not exist in this case. There is no pretense of any "valuation of property"—or "agreed valuation" of the actual damages in this case "as just and reasonable." But the trifle paid is fixed as the limit of liability as a *usual condition in this and other cases*, without any pretense of being based on the actual or probable damages in each case.

This cannot be said to be in any proper sense "a just and reasonable valuation of property," or liquidation of damages in advance within the purview or spirit of the doctrine in the Hart case; but is on its face an absurdity unjust and unreasonable, and as such to be held void.

*Marr vs. Tel. Co.* (Supreme Court of Tenn., March, 1887.) 1 R'y & Corp. Law J., 290; S. W. R., Vol. 3, p. 496.

The findings of fact by the court below show, *ante*, p. 2 (record, p. 15), that the message was "written on one of the USUAL FORMS furnished by the company." In other words,

that the company received all messages under this arbitrary limitation of liability.

As said by the court in *True vs. Tel. Co.*, 60 Me., 19:

"*The duty and responsibility of the company cannot be measured by the price paid for the duty undertaken.*" * *

On p. 21:

The "trifle" paid "IS NEVER THE MEASURE OF DAMAGES FOR NON-PERFORMANCE OF A CONTRACT of this kind."

In effect the same is held by a multitude of authorities.

In *Marr vs. West'n Union Tel. Co.*, 1 R'y & Corp. L. J., 290, 3 S. W. R., 496, a recent and exhaustive case, the supreme court of Tennessee say (p. 501, 3 S. W. R.):

"In this latter case (*Hart vs. Penn. R. R. Co.*) the court say the test to which every limitation of the common law liability of the carrier should be subjected is '*its just and reasonable character.*'

If it be assumed, for we do not determine this question, that a telegraph company may, by fair, just and reasonable regulations, limit the amount of damages to which it may be subjected by reason of negligence, then will the terms and conditions upon which this company propose to conduct its business stand the test of justness and reasonableness?

It must at the outset be conceded that a telegraph company, like a common carrier, must offer to do the business of the public, subject to ordinary liability for negligence upon terms fair and reasonable; and if it does not do this, it does not offer a choice of terms, and cannot escape full responsibility *even upon the view of the law contained in Hart vs. Penn. R. R. Co.*

* * * * * * *

Practically the scale of graded charges offered by this company afford no real choice of terms. The price at which they propose to send messages, subject to the ordinary legal liability—the insurance proposition—is so grossly in excess

of the cost of service, as ascertained by comparison with the terms offered for service without such liability, that we do not hesitate to hold the conditions limiting the liability of this company for negligence, are not fair, just or reasonable, and are void as against public policy. They constitute, taken together, but an artful arrangement and device by which the consequences of their own negligence are thrown upon the shoulders of their customers, and they are enabled to conduct business with no responsibility beyond the most trivial character for their own want of due care.

*The terms upon which they do assume full liability are so arranged and so exorbitant as probably never to be called into use.*"

It need only be further observed that the cases holding such limitation of liability reasonable and valid, are based on the refinement between negligence and gross negligence, which this court in the Lockwood case has obliterated as a practical distinction.

## III.

### The Fourth Question.

What is the rule of damages? *ante*, p. 6 (record, p. 18).

The authorities are uniform in support of the damages recovered in the court below in this case. The rule of damages measured substantially, as in this case by the court below, is established in the following cases:

*Tel. Co. vs. Wenger*, 55 Pa. St., 262.
*Squire vs. Tel. Co.*, 98 Mass., 239.
*Tyler vs. Tel. Co.*, 60 Ill., 421.
*True vs. Tel. Co.*, 60 Me., 26.
*Bartlett vs. Tel. Co.*, 62 Me., 222.
*Manville vs. Tel. Co.*, 37 Iowa, 220.
*Turner vs. Tel. Co.*, 41 Iowa, 458.
*Sweatland vs. Tel. Co.*, 27 Iowa, 433.

*Rittenhouse vs. Tel. Co.*, 44 N. Y., 263.
*Tel. Co. vs. Dryburg*, 35 Pa. St., 298.
*Leonard vs. Tel. Co.*, 41 N. Y., 544.
*Tel. Co. vs. Hobson*, 15 Grattan, 122.
*Tel. Co. vs. Graham*, 1 Col., 230.
*Tel. Co. vs. Fenton*, 52 Ind., 1.
*Marr vs. Western Union Tel. Co.*, supreme court of Tenn., 1887, Vol. 1 R'y & Corp. Law, p. 290; S. W. R., Vol. 3, p. 496.

In *Tel. Co. vs. Wenger*, 55 Pa. St., 262, the advance in price was held to be the measure of the damages.

In *Squire vs. West. U. Tel. Co.*, 98 Mass., 239, the court say:

"The sum, therefore, which would compensate the plaintiff for the loss and injury sustained by them would be the difference, if any, in the price which *they agreed to pay* for the merchandise by the message which defendants undertook to transmit if it had been duly and seasonably delivered in fulfillment of their contract and the sum which the plaintiff *would have been compelled to pay* at the same place in order, by the use of due diligence, to have purchased the like quantity of the same species of merchandise."

*Tyler vs. W. U. Co.*, 60 Ill., 421.
*W. Tel. Co. vs. Wenger*, 55 Pa. St., 262.

In *True vs. Telegraph Company*, 60 Me., 26, it is said by the court that—

"The sum, therefore, which would be a compensation for the direct loss and injury sustained by the non-delivery of this message, *is the difference* (if at a higher rate) between the *ninety cents named* and the sum which the plaintiffs were *or would have been compelled to pay* at the same place, in order, by due and reasonable diligence, after notice of the

failure of the telegram, to purchase the like quantity and quality of the same species of merchandise." Citing—

*Squire vs. W. U. T. Co.*, 98 Mass., 232.

In *Manville vs. Telegraph Company*, 37 Iowa, 220, it is said by the court:

"The party failing to deliver the goods according to agreement has injured the other party; the measure of that injury, where the price has not been paid, is fixed by law at the sum which the goods *would have brought* in market at the time and place of delivery, *less the contract price.* The *law deems it certain that if the goods had been delivered to the purchaser he could have sold them for the market value.* This value is capable of being ascertained with regard to all commodities having a fixed market price. The same rule, based upon the same principle, is applicable in this case.

The market value of hogs in Chicago on any day was capable of being certainly ascertained. If the defendant had had his hogs in Chicago three days sooner he could have sold them at the then market price. He was prevented from shipping his hogs sooner by the negligence of defendant's agent. The difference, therefore, between the market value of the hogs on the day plaintiff *could have put them on the market*, if the defendant had been guilty of no negligence in the delivery of the dispatch, and the market price *when he was afterward able* to put his hogs into the market, is the direct consequence of the neglect of the defendant."

In *Thompson vs. Tel. Co.*, 64 Wis., 531, the message was, "Send bay horse to-day—Mock loads to-night."

The court say, page 537:

"The only other question in the case is whether the plaintiff upon the facts proved was entitled to recover more than nominal damages.

It seems to us that the telegram itself informed the agent of the company that it was of importance that the horse men-

tioned therein should be sent to Boscobee immediately on receipt of the telegram, so that he would arrive there before Mack would load his horses that evening. * *

The evidence clearly tends to show that the plaintiff *lost the sale of the horse to Mack by reason of the delay in transmitting the message, and that the loss of such sale was a damage to them of $25, which was the amount they recovered.*"

In *Rittenhouse vs. Telegraph*, 44 N. Y., 263, it is said by the court:

"If the message had been correctly transmitted the plaintiff, through their agents, could have purchased the 500 shares of Hudson River Railroad stock for $136.75 per share. As it was, using the utmost diligence, they were obliged to pay $139.50 per share, and this is the measure of their damage. In order to hold the defendant liable for the damage, IT WAS NOT INCUMBENT ON THE PLAINTIFF TO PURCHASE THE STOCK. *This purchase and the price that they were obliged to pay, $139.50 per share,* WAS ONLY IMPORTANT AS SHOWING THE EXTENT OF THE DAMAGE. *The plaintiffs could have maintained their suit against the defendant without having purchased the stock by showing that immediately, or soon after the delivery of the erroneous message, the stock was in the market so that their order could not have been filled for less than the $139.50 per share.*"

## IV.

### The Fifth Question.

*Ante*, p. 6 (record, p. 18): "Was the message so obscure and uncertain on its face that the defendant would not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded?"

The message was: "Buy ten thousand if you think it safe. Wire me."

This question seems to be simple and easy.

It is to be observed that the question does not involve the point sometimes raised, whether or not it is SUFFICIENT for the message to show on its face that it pertains to a business transaction. The limit of the question is whether the message shows on its face that it pertains to a business transaction that ought to be properly and promptly forwarded. The message clearly orders a large purchase, and the injunction "*Wire me*," emphasizes the importance of the purchase and the promptness to be observed.

Messages similar or of less plain import have been held sufficient in the following cases:

In *Telegraph Company vs. Wenger*, 55 Pa. St., 262—

"Buy fifty (50) Northwestern, fifty (50) Prairie du Chien; limit forty-five (45)."

In *Squire vs. Telegraph Company*, 98 Mass., 232—

"Will take your hogs at your offer; our man will be there Tuesday morning."

In *Tyler vs. Telegraph Company*, 60 Ill., 421—

"Sell one hundred (100) Western Union. Answer price."

In *Telegraph Company vs. Griswold*, 37 Ohio, 301—

"Will you give one fifty for twenty-five hundred, London? Answer at once, as I have only till night."

In *True vs. Telegraph Company*, 60 Me., 9—

"Ship cargo named at ninety if you can secure freight at ten. Wire result."

In *Sprague vs. Telegraph Company*, 6 Daly, 200—

"Hold my case till Tuesday or Thursday. Please reply."

In *Manville vs. Telegraph Company*, 37 Iowa, 214—

"Ship your hogs at once."

In *Thompson vs. Telegraph Company*, 64 Wis., 531—

"Send bay horse to-day. Mock loads to-night."

In *Candee vs. Telegraph Company*, 34 Wis., 471.

A message in cypher.

In *Telegraph Company vs. Graham*, 1 Col., 230—

"Ship oil as soon as possible at the best rates you can."

In *Telegraph Company vs. Wenger*, 55 Pa. St., 262, the message was:

"Buy fifty (50) Northwestern, fifty (50) Prairie Du Chien, limit forty-five (45)."

And the court say:

"The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it containing the order."

In *Tyler, et. al. vs. W. U. Tel. Co.*, 60 Ill., 421, the message was, "sell one hundred (100) Western Union. Answer price."

The court say the dispatch disclosed the nature of the business as fully as the case demanded. Citing—

*Tel. Co. vs. Wenger*, 55 Pa. St., 262.

In *Telegraph Co. vs. Griswold*, 37 Ohio St., 301, the message was—

"Will you give one-fifty for twenty-five hundred London. Answer at once, as I have only till night."

The court say:

"It appeared upon its face that it related to a business transaction; a transaction involving the purchase and sale of property. The company was, therefore, apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received."

## V.

### The Sixth Question.

*Ante* p. 6 (Record, p. 18): "Was the notice of the claim sufficient?"

The notice and facts stated will be found, printed record, p. 17, and herein, *ante* p. 5.

This notice was served on the defendant company December 22, 1882, the message being sent on November 9, 1882. The notice is within the sixty days.

The most and worst that can be said as to this notice is that it is not only notice of the plaintiff's claim, but is also notice of a suit. It would stand as a most singular outcome of logic and law, if notice of a claim by the plaintiff against the defendant, and stating specifically the date and ground of the claim, is impaired or insufficient as a notice of the claim because the plaintiff also gives notice of a suit on the claim.

The scope for argument in such a case seems to be limited to the mere statement of the fact, and that apparently makes the answer to the question involved self-evident and self-illuminating.

In *Smith et al. vs. Railroad Company*, 56 Iowa, 721, the court held that *notice of an attorney's lien in a pending suit, inserted by plaintiff's attorneys in the original notice served upon the defendant in an action, is sufficient, if properly signed.*

In *Blackington vs. City of Rockland*, 66 Me., 334, where notice was required by statute within sixty days, Peters, J., who is the present Chief Justice of the Maine supreme court, said:

"The main object of a notice is, that the town may have an early opportunity of investigating the cause of the injury and the condition of the person injured, before changes may

occur essentially affecting such proof of the facts as may be desirable for the town to possess; and a minor purpose of a town would be, perhaps, that the town should have a favorable chance to settle a claim before being sued for it, should they see fit to do so.

In this view, we think the notice is sufficient *which describes the facts substantially and in general terms*, so that thereby a town may have statements and intimations that would be likely to lead them, acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case."

In *Sawyer vs. Naples*, 66 Me., 454, where notice of the claim for damages was required by statute within sixty days, Chief Justice Appleton said:

"The object of the notice is to enable the town seasonably to investigate claims for injury before the proof of the facts shall become unattainable from lapse of time or loss of life or memory.

* * * * * * *

*Neither is it necessary that the extent of the damages should be stated in dollars and cents.* The party injured may not know the extent of the injury received. It may be greater than is at first supposed, or it may be less. What the legislature deemed important was that towns should be notified that damages are claimed, not what sum of money would be sufficient to compensate the injured party."

In *Express Company vs. Caldwell*, 21 Wall., 264, such a condition is sustained solely on the ground that it is reasonable for the shipper "to assert his claim *in season* TO ENABLE THE DEFENDANTS TO ASCERTAIN THE FACTS."

This is the only ground on which such a condition has been sustained as reasonable by any court.

It is sufficient that the notice in this case fully answers within the time prescribed the fundamental purpose for which such a condition is held valid.

It is to be observed that the condition in question in no manner precludes the bringing of a suit on the claim at the same time the claim is presented; but this question is not raised as "a distinct point" by the sixth question. The only requirement is that the "claim is presented in writing within sixty days after sending the message." This requirement was fully complied with in this case by the notice in question.

Respectfully submitted.

CROM BOWEN,
WHITING S. CLARK,
*Attorneys for Defendant in Error.*

CHARLES A. CLARK, *of Counsel.*

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IN THE

# United States Supreme Court

OCTOBER TERM, 1884.

NO. 1050. 83

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,*

*Against*

GEORGE F. HALL, *Defendant in Error.*

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

MOTION BY DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION WITH BRIEF FOR DEFENDANT IN ERROR.

CHARLES A. CLARK,
CROM BOWEN
WHITING S. CLARK, } *For Defendant in Error.*

GEORGE G. WRIGHT,
A. B. CUMMINS, } *For Plaintiff in Error.*

IN THE

# United States Supreme Court.

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WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error*,
*vs.*
GEORGE F. HALL, *Defendant in Error.*

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

To said plaintiff in error or its counsel, Hon. George G. Wright: You are hereby notified that the defendant in error in the above entitled cause will file and submit in said court, on Monday, the 27th day of April, 1885, the motion to dismiss the writ of error in said cause, with brief in support thereof hereto annexed.

CHARLES A. CLARK,
CROM. BOWEN,
WHITING S. CLARK,
Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1884.

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error*,
*vs.*
GEORGE. F. HALL, *Defendant in Error.*
No. 1050.

MOTION

by defendant in error to dismiss writ of error for want of jurisdiction, with

BRIEF FOR DEFENDANT IN ERROR.

Now comes the defendant in error, George F. Hall, by his attorneys, and moves the court to dismiss the writ of error, in the above entitled cause, for want of jurisdiction because the record is insufficient in this:

1. That there is no finding by the circuit court of the ultimate facts upon which the several questions herein certified are based, but the statement of facts by the circuit court spreads upon the record all the material evidential facts introduced in the trial, and is substantially a mere report of all the evidence in the case.

2. Each several question certified is based upon the assumption of ultimate facts which are nowhere found and stated in the record by the circuit court.

3. All the material facts in evidence are spread upon the record commingled in a general mass, and each question certified is stated without reference to any particular evidential facts from which ultimate facts might be drawn.

STATEMENT OF FACTS.

The parts of the record which need to be considered by the court are set out herein in full.

This action was brought by Hall, the defendant in error, to recover damages for the negligent failure to transmit and deliver promptly a telegram sent by him from Des Moines,

Ia., ordering the purchase of 10,000 barrels of petroleum, at Oil City, Pa., the morning of the 9th of November, 1882. The primary cause of the failure to deliver the telegram was the negligent omission to transmit the name of the party to whom the telegram was sent.

The case was tried by the circuit court, two judges sitting, upon a stipulation waiving a jury and an agreed statement of facts and testimony. (Record p. —).

Judgment was rendered in favor of Hall for $1,800, the difference in the price between the time the petroleum would have been purchased had the telegram been properly and promptly transmitted and delivered, and the price at the earliest time it could be purchased after the telegram was delivered.

The court below made a statement of all "the material facts in the case," (Record p. —) with a certificate "that on the trial of said cause they were divided in opinion and were unable to agree upon the following questions of law arising on said trial" (Record p. —), with the six questions certified.

The stipulation signed by counsel was as follows: (Record p. —.)

STIPULATION OF FACTS TO BE USED IN THE ABOVE ENTITLED ACTION.

Defendants received plaintiff's message at their Des Moines office, Iowa, at 8 o'clock a. m., Nov. 9, 1882, for immediate transmission to Charles T. Hall, as directed. The original message is annexed and made a part hereof, marked Exhibit A.

EXHIBIT A.

(Message is hereinafter given in statement of facts by the court.)

The plaintiff paid the defendant the usual charge for sending said message.

On receipt of said message by defendant's operator at their Oil City, Pa., office, at 11 o'clock a. m., November 9, 1882, a part of the address had been omitted.

The message as received by the operator at Oil City, Pa., is annexed hereto, marked Exhibit B.

## EXHIBIT B.

Form No. 1.

THE WESTERN UNION TELEGRAPH COMPANY.

This Company **TRANSMITS** and **DELIVERS** messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of **Unrepeated Messages**, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an **UNREPEATED MESSAGE**, and is delivered by request of the sender, under the conditions named above,

THOS. T. ECKERT, General Manager. NORVIN GREEN. President.

| NUMBER. | SENT BY. | REC'D BY. | CHECK. |
|---|---|---|---|

Received at Oil City, Pa., 10:53. Nov. 9, 1882.

Dated Des Moines, Iowa.

To Exchange,

Oil City, Pa.

*Buy ten thousand if you think it safe. Wire me.* GEO. F. HALL.

No steps were taken to procure the correct address till the message had been sent to the Exchange building named therein, where the officers of the Board of Trade refused to receive it, at 11:30 a. m. that day, and then the correct address was procured by telegraphing to the sending office, and the operator at Oil City, would testify that he did not in fact know that a part of the address had been omitted until so advised by the sending office.

Message was delivered to said Chas. T. Hall at about 6 o'clock p. m., November 9, 1882, too late to make the purchase referred to in the message on that day. The time reasonably necessary for the delivery of the message from the office in Oil City to Chas. T. Hall, if correctly directed when received was thirty minutes.

The message was intended by the sender to direct said Chas. T. Hall to buy

10,000 barrels of petroleum oil for the plaintiff, if the market price when the message was received was such that said Chas. T. Hall thought it safe to do so. and would so have been understood by him, and Chas. T. Hall would testify that if he had received said message any time from 11:30 a. m., November 9, 1882, to 12 m. that day, he would have made the purchase for the plaintiff as directed, and he remembered that when he did receive the telegram at 6 o'clock p. m. of said day, he came to the conclusion that if it had been received before 12 m. he would have thought it safe and advisable to make the purchase as the market then was, and that he made purchases for himself at that time, viz: between 11:30 and 12 m. The price of said oil at said Oil City at 11:30 a. m. that day, was $1.15 per barrel; at 12 m. that day, $1.17 per barrel; at the close of the Oil Exchange, at 4 p. m. that day, $1.29½ per barrel. Such purchases could not be made after the close of the Oil Exchange till its opening at 10 a. m. the next day, when the price was $1.35 per barrel, and said Charles T. Hall did not deem it safe and advisable to buy at that price. The "Exchange" named in plaintiff's message was itself a building at Oil City, and well known by every one there, where members of a Board of Trade, with a regular organization with President, Secretary and Directors, held daily sessions from 10 a. m. till 4 p. m., to buy and sell said oil at the market prices, and said Chas. T. Hall was a member thereof, and this was the only place where such sales and purchases as the one in question were made at said Oil City.

The memorandum on said message Exhibit B means that defendant notified the officers of said Board of Trade at said Exchange, at 11:30, November 9, 1882, of said message, but the officers refused to receive the same. It is further stipulated that the defendant had, on November 9, 1882, no other information as to the meaning or importance of said message than what was disclosed by the message itself, and that its employes at said Des Moines office did not know what was directed to be purchased by said message. That the plaintiff, the sender of said message, did not request the defendant to repeat the same nor offer to pay therefor.

That the plaintiff's claim for damages has never been presented in writing to the defendant, otherwise than by bringing this suit, and by service of the original notice herein as shown by the officer's return thereon, which are made a part hereof.

It is further stipulated that this shall be submitted to the court upon the above statement of fact, waiving a jury.

## ORIGINAL NOTICE.

| | |
|---|---|
| GEORGE F. HALL, *Plaintiff.*<br>*vs.*<br>THE WESTERN UNION TELEGRAPH CO., *Defendant.* | In the Circuit Court of the State of Iowa, in and for Polk Couty, January term, A. D. 1882. |

(Notice is hereinafter given in statement of facts by the court.)

## OFFICER'S RETURN.

This notice came into my hands December 22d, 1882, and I certify that I personally served the same on the within named Western Union Telegraph Company by offering to read the same to T. A. Yearnshaw, agent of said company, which he waived, and delivered a copy of the same, in Polk county, Iowa, on the 22d day of December, 1882.

A. D. LITTLETON, Sheriff of Polk County, Iowa.

By F. A. BAYLIES, Deputy.

Fees, 90 cents.

The following is the statement of the case made by the circuit court with the questions certified, viz:

## FINDING OF THE FACTS AND CERTIFICATE OF DIVISION OF OPINION.

This case was submitted to the court, a jury being waived upon a stipulation setting forth certain facts admitted by the parties and also containing what certain persons would testify if called as witnesses.

The Court finds the following *as the material facts* in this case:

The plaintiff at 8 o'clock a. m., November 9, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraphic dispatches, at its office in Des Moines, Iowa, a message in the following form, and plainly written on one of the usual blank forms furnished by the company.

Form No. 2.

THE WESTERN UNION TELEGRAPH COMPANY.

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it REPEATED: that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for

non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of messages to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employee of the Company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office—for delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The Company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

| *Receiver's No.* | *Time Filed.* 8 A. M. | *Check.* |
|---|---|---|

*Send the following message, subject to the above terms, which are agreed to* 11-9 1882.

To Charles T. Hall,

Exchange,

Oil City, Pa.

*Buy ten thousand if you think it safe. Wire me.* GEO. F. HALL.

☞READ THE NOTICE AND AGREEMENT AT THE TOP.☜

The same being furnished and received by the defendant

for immediate transmissal to Charles T. Hall, at Oil City, Pa., the usual and ordinary charge therefor being paid by defendant.

Through the negligence and want of ordinary care on the part of defendant's employe at Des Moines, the message so received was forwarded to Oil City, Pa., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Pa., at 11 o'clock a. m., November 9.

The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a Board of Trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 a. m. until 4 p. m.

The officers of the Exchange, or Board of Trade, refused to receive the dispatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the dispatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall, at 6 o'clock p. m., November 9, 1882.

Had it not been for the error in sending the dispatch, without including the name of Charles T. Hall, it would have been delivered to him at Oil City at 11:30 a. m., November 9, 1882.

The meaning of the dispatch was to direct Charles T. Hall to buy 10,000 barrels of petroleum, if in his judgment it was best to do so.

Had the dispatch upon its first receipt at Oil City., Pa., been promptly delivered to Charles T. Hall he would, by 12 o'clock, m., November 9, have purchased 10,000 barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff.

When the dispatch was delivered to Charles T. Hall the Exchange was closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff.

At the opening of the Board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall

did not deem it advisable to make the purchase and hence did not do so. It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10, 1882.

The operator acting for the defendant had no other knowledge of the meaning or purpose of the dispatch than is to be gathered from the message itself.

The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the dispatch in question in the circuit court of Polk County, Iowa, the original notice being served upon the defendant on the 22d day of December, 1882. Under the statutes of Iowa, actions in the courts of that State are commenced by serving an "Original Notice," which is signed by the plaintiff or his attorney and is addressed to the defendant. No summons or writ under the seal of the court is issued.

The notice in this case was addressed to the defendant, and after entitling the cause proceeded as follows:

*To Said Defendant:* You are hereby notified that on or before the 22d day of December, A. D. 1882, the petition of the plaintiff in the above entitled cause will be filed in the office of the Clerk of the Circuit Court of the State of Iowa, in and for Polk county, claiming of you the sum of fifteen hundred dollars as loss and damages suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram as set forth in said petition, on November 9, 1882, from the plaintiff to Charles T. Hall, at Oil City, Pa

And that unless you appear thereto and defend before noon the second day of the January term, A. D. 1883, of the said Court, which will commence on the 2nd day of January, A. D. 1883, default will be entered against you and judgment rendered thereon.

CROM BOWEN,
WHITING S. CLARK,
Attorneys for Plaintiff.

No other presentation of the claim was made by plaintiff.

Upon the foregoing facts it is the opinion of the presiding judge that the law is with the plaintiff, and that he is entitled to judgment in the sum of $1,800, and it is so ordered as the judgment of the court.

The judges holding said circuit court and before whom said cause was tried, hereby certify that on trial of said cause they were divided in opinion and were unable to agree upon the following questions of law arising in said trial and necessary to be determined in order to finally determine said cause, to-wit:

1. Can the defendant, having in the usual line of its business accepted said message from plaintiff for transmissal to the party named therein at Oil City, Pa., and having received its usual charges for such services, be heard to say that it was not bound to exercise ordinary care in transmitting the same, and that it is only liable to the plaintiff in damages in case of gross negligence on its part.

2. Under the contract legally existing between the plaintiff and defendant, whereby the latter assumed the duty of forwarding said message, the same being an unrepeated message, was the defendant bound only to the exercise of slight care or to the exercise of ordinary care.

3. Under the contract legally existing between plaintiff and defendant whereby the defendant assumed the duty of forwarding said message, the same being an unrepeated message, can the defendant in any event be held to respond in damages beyond the amount paid to the company for forwarding the said dispatch.

4. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rule is to govern in ascertaining the same? Are the damages merely nominal, or is the plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Charles T. Hall, at Oil City, Pa., it being admitted that he did not make the purchase for the reason that in his judgment the price on the morning of November 10, 1882, was too high to justify purchasing.

5. Was the message so obscure and uncertain on its face that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded.

6. Was the original notice in this cause a sufficient compliance with the clause in the contract providing that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." If not, is the right of recovery barred by the failure to present the claim in writing?

Wherefore said points of disagreement having been duly reduced to writing under the direction of said Judges are ordered, together with the findings of fact, to be entered of

record as a certificate of division of opinion in said cause. All being done this May term, 1884, of said court.

(Signed) J. M. LOVE,
O. P. SHIRAS,
Judges.

The provisions of Sections 649, 650, 652 and 693 of the United States Revised Statutes are pertinent in the consideration of the motion, but are familiar as relating to matters of proceedure and jurisdiction and do not need to be quoted at length.

## BRIEF IN SUPPORT OF MOTION TO DISMISS.

### I.

The three grounds in the motion to dismiss the writ of error herein go to the same general purpose and point: That the court made no finding of any ultimate facts in the case upon which the questions certified can be based, but has instead spread upon the record a statement of all the material and primary evidential facts shown upon the trial, from which such proper ultimate facts as may be, were to be deduced, and must be deduced and stated by the circuit court before any proper basis for the questions certified could be laid.

These three grounds may be considered together.

There can, we think, be no claim or pretense that the statement of facts made by the court (Record p. —) is a finding of any ultimate facts such as are required as a basis for the questions certified, or is anything more than a statement of all the material primary evidential facts shown in the trial—a mere report or abstract of all the material evidence. In fact that is all it purports to be upon its face, to-wit: "The material facts in the case." (Record p. —)

A glance at these material facts and a comparison of this statement of "material facts" with the agreed facts in the stipulation by counsel (Record p. —) will show—

1. That these "material facts" are themselves in their na-

ture mere primary evidential facts, from which such ultimate facts as may be, could be deduced and stated, but are in no sense the ultimate facts such as the questions certified must be based upon.

2. That the statement by the court of these "material facts" is a mere reproduction at length of the primary evidential facts set forth in the stipulation by counsel, and a mere report or abstract of the evidence found in the stipulation; that every fact in the statement by the court is transferred and reproduced from the stipulation by counsel substantially as therein found stated as mere primary and evidential facts, with perhaps one exception.

The phrase, "Through the negligence and want of ordinary care on part of defendant's employe at Des Moines" as to the message forwarded to Oil City with the name of the party to whom it was addressed wholly omitted, is the only statement by the court below that can be fairly termed a conclusion.

This is by no means an ultimate fact, but a mere intermediate and evidential one, the force of which depends wholly upon other primary and evidential facts in the statement. For whether any liability would follow the omission of the name in the first instance, would depend upon how soon the omission was corrected, and many other subsequent facts. If the operator had called back for the name and obtained it in thirty seconds it is evident no liability would follow from the original negligent omission.

This sort of reproduction, therefore, of mere primary evidential facts does not, from the very nature of the facts set forth, form any sufficient basis for the questions certified.

The ultimate facts on which the questions are based are not deduced and stated by the circuit court, and it is no part or task of this court to examine a mass of primary evidential facts and determine whether the proper ultimate facts could be

deduced and stated from them as a basis for the questions certified.

The decisions of this court sustain this proposition clearly and fully.

*Denistoun vs. Stewart*, 18 How. 565.
*United States vs. City Bank of Columbus*, 19 How. 387.
*Daniels vs. Railroad Company*, 3 Wall 256.
*Havemayer vs. Iowa County*, 3 Wall 304.
*Norris vs. Jackson*, 18 Wall 127.
*Crews vs. Brewer*, 19 Wall 70.
*Bethell vs. Matthews*, 13 Wall 1.
*Kearney vs. Case*, 12 Wall 275.

In *Denistoun vs. Stewart*, 18 How. 565, the court say:

And the question or questions upon which the Judges were opposed must be distinctly *stated with reference to that part of the case upon which such question or questions shall have arisen.*

In *Daniels vs. Railroad Company*, 3 Wall 256, the court say:

The questions must be separate and distinct, and each one must be particularly stated with reference to that part of the case upon which it arose. THEY MUST NOT BE SUCH AS INVOLVE OR IMPLY CONCLUSIONS OR JUDGMENT BY THE JUDGES UPON THE WEIGHT OR EEFECT OF THE TESTIMONY OR FACTS ADDUCED IN THE CAUSE.

Citing *Denistoun vs. Stewart*, 18 How. 565.

The question must not be general nor abstract, *nor a mixed one of law and fact.* If it be either, this Court cannot take jurisdiction.

Citing *Ogilvie vs. Insurance Company*, 18 How. 577.

In *Havemayer vs. Iowa County*, 3 Wall 304, the court say:

It is necessary that the question should involve a distinct legal point, and *that sufficient facts should be set forth to show its bearing upon the rights of the parties.*

In *Norris vs. Jackson*, 18 Wall 127, the Court say:

This special finding has often been considered and described by this Court. IT IS NOT A MERE REPORT OF THE EVIDENCE, BUT A STATEMENT OF THE ULTIMATE FACTS ON WHICH THE LAW OF THE CASE MUST DETERMINE THE RIGHTS OF THE PARTIES, A FINDING OF THE PROPOSITIONS OF FACT WHICH THE

EVIDENCE ESTABLISHES, AND NOT THE EVIDENCE ON WHICH THOSE ULTIMATE FACTS ARE SUPPOSED TO REST.

Citing *Burr vs. Des Moines County*, 1 Wall 99; *Graham vs. Bayne*, 18 How. 62.

In *Crews vs. Brewer*, 19 Wall 70, the court say:

Nor can questions of law presented in such (common law) cases be re-examined here unless the matters of fact out of which they arise are in some form given in the record; TO WHICH MAY BE ADDED AS APPLICABLE TO CASES TRIED BY THE COURT THAT A MERE REPORT OF THE EVIDENCE IS NOT SUFFICIENT, AS IT BELONGS TO THE CIRCUIT COURT TO FIND THE FACTS, AND IN ORDER TO DO THAT THE CIRCUIT COURT MUST WEIGHT THE EVIDENCE AND DRAW THE INFERENCES OF FACT FROM THE WHOLE EVIDENCE.

A statement of facts signed by counsel cannot be deemed a finding of fact.

*Bethell vs. Matthews*, 13 Wall 1.
*Kearney vs. Case*, 13 Wall 275.

Of course a mere reproduction of the evidential facts from a stipulation by counsel cannot be held sufficient.

II.

A glance at the questions certified will demonstrate further the facts stated in the motion as grounds for dismissal.

1. For instance, as to the first question: There is no finding that defendant "in the usual line of its business accepted said message." There is no finding as to "gross negligence" on the part of defendant; or that the name was omitted "through the negligence and want of ordinary care" ONLY, and not from gross negligence. Without these findings and other ultimate facts implied in the question, there is no proper basis in the case for the question, and it becomes an abstract question outside of the case.

2. As to the second question, there is no finding as to a "contract legally existing between the plaintiff and defendant," nor as to "an unrepeated message;" and having found that "through the negligence and want of ordinary care on part

of defendant" the name was omitted, this must exclude a question based on "the exercise of SLIGHT care."

3. The third question is open to the same objections sufficiently to be clearly based on unfound assumptions of fact.

4. The fourth question is hypothetical and based on no definite reference to definite facts, but by implication on the diffuse evidential facts set forth in the statement by the court below. To have any basis for this question there should be definite findings of ultimate facts, to:wit: That there was a contract for the immediate transmission and *delivery* of the message, and its terms and conditions material to the case; that defendant had negligently failed to perform the contract, and what in exact terms the damages were upon each of the two branches of the question, not the mere evidential facts from which inferences might be drawn establishing these or other ultimate facts. But there is nothing of this sort.

5. As to the fifth question, there is no finding that the message "pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded." That is an ultimate conclusion to be drawn, if at all, from the whole mass of commingled evidential facts.

6. As to the sixth question, there is no finding that there was any "contract" with the clause referred to in it.

But it is of course unnecessary to make any application in detail to the several questions of the general fact that there are no ultimate findings by the court below "of the propositions of fact" on which the questions are based.

Here are six questions in number, containing in fact ten legal problems, covering like a drag net the whole field of telegraph law, without any pretense of findings of the ultimate facts upon which they might arise, but with a mere mass of commingled primary and evidential facts transferred and reproduced substantially just as every fact is stated in the stipulation by counsel—in fact and effect a mere report or abstract of the evidence. We submit that this condition of the

record is fatal to the jurisdiction, and the writ of error should be dismissed.

CHAS. A. CLARK,
CROM BOWEN,
WHITING S. CLARK.
Counsel for Defendant in Error.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.
CLERK.

# UNITED STATES SUPREME COURT,

OCTOBER TERM, 1885.

No. ~~882~~ 85

**THE WESTERN UNION TELEGRAPH COMPANY,**

*Plaintiff in Error,*

*against*

**GEORGE F. HALL,**

*Defendant in Error.*

**MOTION BY DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.**

# BRIEF FOR PLAINTIFF IN ERROR.

**WAGER SWAYNE,**

*For Plaintiff in Error.*

C. G. Burgoyne's "Quick" Print, 146-150 Centre St., N. Y.

# United States Supreme Court,

OCTOBER TERM, 1885.

| | |
|---|---|
| WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, AGAINST GEORGE F. HALL, Defendant in Error. | No. 668. |

## BRIEF FOR PLAINTIFF IN ERROR.

### Statement of Facts.

This is a motion by defendant in error to dismiss a writ of error to the United States Circuit Court for the Southern District of Iowa, for want of jurisdiction, because the record is insufficient.

The action was brought by the defendant in error to recover damages for negligence in the transmission and prompt delivery of a telegram intended to direct the purchase of 10,000 barrels of petroleum at Oil City on the morning of November 9, 1882.

The case was tried by the Circuit Court, two Judges sitting, upon a stipulation waiving a jury and an agreed statement of facts and testimony.

Judgment was rendered in favor of defendant in error for $1,800, the difference in the price between the time the petroleum would have been purchased had the telegram been properly and promptly transmitted and delivered, and the price at the earliest time it could be purchased after the telegram was delivered.

The Judges trying the cause were divided in opinion, and were unable to agree upon certain questions of law arising in the trial, and have certified them to this Court.

The certificate contains a statement of the findings of the facts by the Judges and the questions upon which the Judges disagreed.

The defendant in error claims that the facts are not sufficiently stated, and that the questions are not properly connected therewith.

## ARGUMENT.

### I.

### The facts are properly stated in the certificate.

The object of a statement of facts in the certificate is to show how the points of disagreement arose and to furnish materials for deciding them; and sufficient facts must be set forth to enable the appellate Court to judge of the bearing of the questions upon the rights of the parties.

In Havemeyer vs. Iowa County, 3 Wall, 294, Mr. Justice SWAYNE, delivering the opinion of the Court, says, at p. 303:

"It is necessary that the question should involve a distinct legal point, and that sufficient facts should be set forth to show its bearing upon the rights of the parties. In this case all the facts relied upon as operating to ratify should have been set forth. Any point of disagreement between the Judges relating to the subject would then have appeared in its proper light, and could have been definitely answered."

A comparison of the statement of facts in this case, as found by the Judge, with the questions contained in the certificate, shows that this rule is fully complied with, and, moreover, that no more facts are stated than are necessary. The evidence of the case is not contained in the certificate except so far as it was necessary to make an intelligent statement of the facts. It is not necessary or customary to state the facts applicable to each question in immediate connection with the question to which they relate. The facts are stated connectedly by themselves, and afterwards the questions by themselves. All that is necessary is that they shall be so stated as to make it evident to what part of the facts each question relates. There is no difficulty in this case in determining to what facts each question relates.

The *first* question is based upon the following findings of fact stated in the certificate:

"The plaintiff at 8 o'clock A. M., November 9, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraphic dispatches, at its office in Des Moines, Iowa, a message in the following form, and plainly written on

one of the usual blank forms furnished by the company."

[Here follows a copy of the message.]

"The same being furnished and received by the defendant for immediate transmissal to Charles T. Hall, at Oil City, Va., the usual and ordinary charge therefor being paid by defendant. Through the negligence and want of ordinary care on the part of defendant's employee at Des Moines, the message so received was forwarded to Oil City, Pa., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Pa., at 11 o'clock A. M., November 9."

"The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a Board of Trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 A. M. until 4 P. M.

"The officers of the Exchange, or Board of Trade, refused to receive the dispatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the dispatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall, at 6 o'clock P. M., November 9, 1882."

The printed message which was set out in the certificate showed the following to which this question relates:

"All messages taken by this company are subject to the following terms:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any *unrepeated* message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the

transmission or delivery, or non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case fordelays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

The *second* and *third* questions are based upon the printed provisions in the message set forth in the certificate in reference to repeated and unrepeated messages.

The *fourth* question is based upon the following findings of facts set forth in the certificate:

"Had it not been for the error in sending the dispatch, without including the name of Charles T. Hall, it would have been delivered to him at Oil City, at 11.30 A. M., November 9, 1882.

"The meaning of the dispatch was to direct Charles T. Hall to buy 10,000 barrels of petroleum, if in his judgment it was best to do so.

"Had the dispatch upon its first receipt at Oil City, Pa., been promptly delivered to Charles T. Hall he would, by 12 o'clock M., November 9, have purchased 10,000 barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff.

"When the dispatch was delivered to Charles T. Hall, the Exchange was closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff.

"At the opening of the Board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase, and hence did not do so. It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10, 1882."

The *fifth* question is based upon the message itself, as follows:

"Buy ten thousand if you think it safe. Wire me."

The meaning of which, found by the Court and

one of the usual blank forms furnished by the company."

[Here follows a copy of the message.]

"The same being furnished and received by the defendant for immediate transmissal to Charles T. Hall, at Oil City, Va., the usual and ordinary charge therefor being paid by defendant. Through the negligence and want of ordinary care on the part of defendant's employee at Des Moines, the message so received was forwarded to Oil City, Pa., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Pa., at 11 o'clock A. M., November 9."

"The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a Board of Trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 A. M. until 4 P. M.

"The officers of the Exchange, or Board of Trade, refused to receive the dispatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the dispatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall, at 6 o'clock P. M., November 9, 1882."

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"The meaning of the dispatch was to direct Charles T. Hall to buy 10,000 barrels of petroleum, if in his judgment it was best to do so.

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"When the dispatch was delivered to Charles T. Hall, the Exchange was closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff.

"At the opening of the Board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable, to make the purchase, and hence did not do so. It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10, 1882."

The *fifth* question is based upon the message itself, as follows:

"Buy ten thousand if you think it safe. Wire me."

The meaning of which, found by the Court and

stated in the certificate, "was to direct Charles T. Hall to buy 10,000 barrels of petroleum, if in his judgment it was best to do so."

The *sixth* question is based upon the printed condition in the message, that "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message."

And the following findings of fact in the certificate:

"The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the dispatch in question in the Circuit Court of Polk County, Iowa, the original notice being served upon the defendant on the 22d day of December, 1882. Under the statutes of Iowa, actions in the Courts of that State are commenced by serving an "original notice," which is signed by the plaintiff or his attorney and is addressed to the defendant. No summons or writ under the seal of the Court is issued.

"The notice in this case was addressed to the defendant, and after entitling the cause, proceeded as follows:

"*To said defendant:* You are hereby notified that on or before the 22d day of December, A. D. 1882, the petition of the plaintiff in the above-entitled cause will be filed in the office of the Clerk of the Circuit Court of the State of Iowa, in and for Polk County, claiming of you the sum of fifteen hundred dollars as loss and damages suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram, as set forth in said petition, on November 9, 1882, from the plaintiff to Charles T. Hall, at Oil City, Pa.

"And that unless you appear thereto and defend before noon, the second day of the January Term, A. D. 1883, of the said Court, which will commence on the 2d day of January, A. D. 1887, default will be entered against you and judgment rendered thereon.

"CROM. BOWEN,
"WHITING S. CLARK,
"Attorneys for Plaintiff."

No other presentation of the claim was made by plaintiff."

## II.

**Enough of the questions are in proper form to give this Court jurisdiction.**

It is admitted that the questions certified must each be a question of law and not of fact, and involve a distinct legal point. But if among several questions there is one properly stated, that will be sufficient to require this Court to consider the appeal. If any of the questions violate this rule, they can be rejected, and the defect will not excuse this Court from considering those which are properly stated.

United States vs. Waddell, 112 U. S., 76.
Havemeyer vs. Iowa County, *supra*.

The third question is as follows:

"3. Under the contract legally existing between plaintiff and defendant, whereby the defendant assumed the duty of forwarding said message, the same being an unrepeated message, can the defendant in any event be held to respond in damages beyond the amount paid to the company for forwarding the said dispatch?"

This question clearly presents not only a distinct legal point wholly unincumbered in this case by fact of any kind, but one of constant recurrence, and the utmost consequence upon which there are numerous and varying decisions in the State Courts of last resort; and upon which the careful decision of this Court would be of great value to every interest concerned.

Without discussing the others, this one entitles the plaintiff in error to be heard in this Court.

The motion to dismiss the appeal should, therefore, be denied.

WAGER SWAYNE,
Counsel for Plaintiff in Error.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1887.

THE WESTERN UNION TELEGRAPH COMPANY,
*Plaintiff in Error,*
*vs.*
GEO. F. HALL.

No. 85.

CHARLES A. CLARK. CROM BOWEN, WHITING S. CLARK,
*For Defendant in Error.*

## PETITION FOR REHEARING AND REARGUMENT.

### STATEMENT.

The case made by Hall upon the findings of the court below is that the telegraph company solely by its negligence prevented his purchase of the 10,000 barrels of oil at $1.17 per barrel on November 9, 1882; that the price of the oil the next morning, the earliest time when Hall could have purchased, was $1.35, but Hall did not then buy, because the price was deemed too high to purchase to advantage. Hall had judgment in the court below for the gain prevented in the sum of $1,800. The grounds for reversing this judgment are,

at the conclusion of the opinion by Mr. Justice Matthews, tersely stated as follows:

> The plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and, therefore, was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; NETHER DOES IT APPEAR that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been promptly executed on that day, IT IS NOT FOUND that he would have resold on the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore, for which he is entitled to recover, is the cost of transmitting the delayed message.
>
> The judgment is accordingly reversed and the cause remanded, with directions to enter judgment for the plaintiff for that sum merely.

It is to be observed that there is no authority cited which explicitly goes to the extent of sustaining these grounds or the result.

It is respectfully urged that many additional cases strongly against the result reached by the court are now cited, which seem to be decisive. It is rarely that a case more important to the public and business interests of the country is presented in court, and it is respectfully urged that the questions involved, in view of the importance of the case and the additional authorities now cited, be reconsidered by the court.

A REHEARING AND REARGUMENT IS URGED on the grounds hereinafter stated.

I.

It is to be observed as a fact that HALL LOST THE PURCHASE OF THE OIL AT $1.17 PER BARREL. The finding of the court below is (record, pp. 16 and 17):

> Had the dispatch * * * been promptly delivered * * * he would by 12 M. of November 9 have purchased 10,000 barrels of petroleum at the then market price of $1.17 per barrel.

The opinion states:

> IT IS FOUND AS A FACT that if the dispatch * * * had been promptly delivered to Charles & Hall * * * he would by 12 o'clock on that day have purchased 10,000 barrels of oil at the market price of $1.17 per barrel on plaintiff's account.

And while it is true, in a primary sense, that what Hall lost was the OPPORTUNITY to buy the oil at $1.17 per barrel, it is also true that IN FACT, AS FOUND BY THE COURT BELOW AND STATED IN THE OPINION, what Hall actually lost was THE PURCHASE OF THE OIL AT $1.17 PER BARREL as part and parcel of the OPPORTUNITY. The loss of the purchase inhered in the loss of the opportunity, and IS FOUND AS A FACT by the court below.

This puts the case as to damages for gain prevented in the same class as all cases where there is a loss of THE PURCHASE OF GOODS by the fault of the defendant.

The loss of the purchase is the essential thing. The particular fault which directly caused the loss of the purchase will vary with each case.

When it is considered that the essential thing that Hall lost was the PURCHASE OF THE OIL, and it stands out plain and full as the basis of the claim in the pleadings, in the evidence, in the findings of the court below and in the opinion, the rule of damages for the gain prevented is familiar law.

II.

THE GAIN PREVENTED IS DEEMED CERTAIN FROM THE MARKET PRICE OR ACTUAL VALUE OF THE OIL AT THE TIME HALL COULD HAVE BOUGHT IT, WITH REASONABLE DILIGENCE, AFTER NOTICE OF THE NEGLIGENCE OF THE TELEGRAPH COMPANY.

The ground on which the claim of Hall is based is that THE NEGLIGENCE OF THE TELEGRAPH COMPANY WAS OPERATIVE, IN FULL FORCE, up to the time when he could, with reasonable diligence, have bought the oil after notice of the negligence, and that the damages for gain prevented are to be

based on the MARKET PRICE or ACTUAL VALUE of the oil at that time, without proof that the oil would have been sold at that time and the gain realized *in money;* the gain is deemed certain at that time from the MARKET PRICE OR ACTUAL VALUE of the oil, and without proof as to future transactions beyond that time as too remote and uncertain to be considered, either to DIMINISH the damages or INCREASE the gain.

BELL VS. CUNNINGHAM, 3 Pet., 69.
*Leigh vs. Paterson*, 8 Taunt., 540.
*Bowman vs. Nash*, 9 B. & C., 145.
*Masterton vs. The Mayor, etc., of Brooklyn*, 7 Hill, 70.
*Blanchard vs. Ely*, 21 Wend., 347.
*Griffin vs. Colver*, 16 N. Y., 494.
*Parsons vs. Sutton*, 66 N. Y., 98.
*McHose vs. Fulmer*, 73 Pa. St., 367.
*Haskell vs. Hunter*, 23 Mich., 305.
*R. R. Co. vs. Howard*, 13 How., 344.
*Grand Tower Co. vs. Phillips*, 23 Wall., 480.
*U. S. vs. Speed*, 8 Wall., 84.
*Marsh vs. Peterson*, 105 U. S., 717.
*Hinkley vs. Pittsburg Steel Co.*, 121 U. S., 275.
*Roberts vs. Benjamin*, U. S. Sup. Ct., Oct. T., 1887; Sup. Ct. Rep., No. 13, Vol. 8, 393.
*Squire vs. Tel. Co.*, 98 Mass., 232.
*True vs. Tel. Co.*, 60 Me., 9.
*Rittenhouse vs. Tel. Co.*, 44 N. Y., 263.

In *Bell vs. Cunningham*, 3 Pet., 69, FOR LOSS OF A PURCHASE OF TILES by failure of an agent to buy tiles as instructed, the plaintiff claimed damages FOR THE PROFIT THAT WOULD HAVE BEEN MADE on the tiles at the place of delivery, and the court below instructed the jury (p. 84), "that what the proper damages were must be decided by them upon the whole circumstances of the case; that in

their assessment of damages they were not bound to confine themselves to the state of things at Leghorn (the place of purchase), and were not precluded from taking into consideration the voyage to Havana and the fact of the arrival of the vessel there, THE STATE OF THE MARKETS AND THE PROFITS WHICH MIGHT HAVE BEEN MADE BY THE PLAINTIFFS IF THEIR ORDERS FOR THE TILES HAD BEEN COMPLIED WITH; that this court would not lay down any rule for their government except that they were at liberty to compensate the plaintiffs for their actual losses sustained."

Affirming the correctness of the rule given by the court below, based expressly on THE STATE OF THE MARKETS AND THE PROFITS WHICH MIGHT HAVE BEEN MADE BY THE PLAINTIFFS, Chief Justice Marshall said, p. 85:

"We do not mean that speculative damages, dependent on possible successive schemes, ought ever to be given. * * * Thus, in this case, an estimate of possible profit to be derived from investments at Havana, of the *money* arising from the sale of the tiles, taking into view a distinct operation would have been to transcend the proper limits which the jury ought to respect. BUT THE ACTUAL VALUE OF THE TILES THEMSELVES AT HAVANA AFFORDS A REASONABLE STANDARD FOR THE ESTIMATE OF DAMAGES. The rule that the jury was to compensate the plaintiffs for the actual loss is thought to be correct."

It is to be observed that the term "actual loss" is used both by the court below and by Chief Justice Marshall in a broad sense as including gain prevented. This is an adjudication that has never been questioned, that the damages for preventing a purchase of goods include profits THAT WOULD HAVE BEEN REALIZED BASED ON THE MARKET PRICE at the time and place of the delivery of the goods.

It is to be observed that Chief Justice Marshall in this case draws the line between actual loss as based on the MARKET PRICE at the time, and future speculative and contingent dam-

ages, as too remote based on any scheme or operation or sale in the future beyond the market price at the time.

It is to be observed also that the plaintiff is no more to have the gain based on the market value at the time DIMINISHED by future contingent and speculative schemes and operations, than the defendant is to have the damages against him INCREASED by the same things. And it is to be noticed, further, that the market price or actual value is enough to establish the gain prevented without proof that a sale could have been made at the precise time when the damages are to be computed or at a future time.

It is clear that the telegraph company was simply the agent of Hall to send the message for the purchase of the oil, PAID FOR THE SERVICE; its NEGLIGENCE was the sole cause preventing the purchase. The damages for profits prevented were assessed by the court below precisely as in *Bell vs. Cunningham*, based on the MARKET PRICE, and Chief Justice Marshall said, in *Bell vs. Cunningham*, that this was "A REASONABLE STANDARD FOR THE ESTIMATE OF DAMAGES."

In *R. R. Co. vs. Howard*, 13 Howard, 344, for loss of a job of work, it is said by Mr. Justice Curtis:

"Wherever profits are advisably spoken of as not a subject of damages it will be found that something contingent upon future bargains or speculations or states of the market are referred to, and NOT THE DIFFERENCE BETWEEN THE AGREED PRICE OF SOMETHING CONTRACTED FOR AND ITS ASCERTAINED VALUE OR COST.

See *Masterton vs. Mayor of Brooklyn*, 7 Hill, 61, and cases there referred to.

We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work was a proper subject of damages."

In *U. S. vs. Speed*, 8 Wall., 84, for loss of work on hogs to be packed on contract, Mr. Justice Miller said:

"We do not believe that any safer rule, or one nearer to that supported by the general consent of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the lost time engaged and for release from the care, trouble, risk and responsibility attending the full execution of the contract." "The leading case on this subject in this country is *Masterton vs. Brooklyn*, and that fully supports the proposition of the court of claims."

In *Grand Tower Co. vs. Phillips*, 23 Wall., 480, for loss of a purchase of coal contracted for, and where it was not shown that the plaintiff bought other coal, Mr. Justice Bradley said:

"The true rule would seem to be to allow the plaintiffs to show the price they WOULD HAVE HAD to pay for coal * * * at the nearest available market where it could be obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling, if any, would be the true measure of damages."

In *Marsh vs. McPherson*, 105 U. S., 717, Mr. Justice Matthews said:

"If there had been a total failure on the part of the defendants to comply with the contract, and they had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which at the time of the breach HE COULD HAVE SUPPLIED HIMSELF by purchase from others with the same number of similar articles of equal value. * * * THE RULE TO MEASURE THE LOSS IN SUCH CASES BEING THE DIFFERENCE BETWEEN THE CONTRACT AND THE MARKET PRICE."

In *Roberts vs. Benjamin*, U. S. Supreme Court Rep., No. 13, Vol. 8, 393, it is held by this court that for failure to deliver iron according to contract, the rule of damages is the

difference between the contract price and the MARKET PRICE AT THE DATE OF THE REFUSAL TO FULFILL THE CONRACT.

It is urged that there is no essential distinction between the case of *Squire vs. Tel. Co.*, 98 Mass., 232, and the case at bar. In both, the essential thing lost by the negligence to deliver the telegram was the PURCHASE OF THE GOODS.

In this case the market price was a public offer to sell, and Hall ordered the purchase, if thought "safe" by his agent, and the court below has found AS A FACT that if the message had been promptly delivered the oil would have been purchased at $1.17 per barrel. In the Squire case it was not shown that the purchase was for resale. In fact, it was a purchase of hogs for packing purposes. Nor was it shown that Squire replaced the purchase lost by another at the time and place.

At some subsequent time the purchase was replaced by buying others, but whether at a higher or lower price than the MARKET PRICE at the time they could have bought them with reasonable diligence, or at the same place, is not shown.

In fact, the actual loss from such subsequent purchase was wholly discarded and ignored as a basis of damages, and the MARKET PRICE at the time they could, with reasonable diligence, have bought was adopted, without regard to whether the profit prevented would be greater or less than the actual loss by the subsequent purchase.

In *True vs. Tel. Co.*, 60 Me., 126, under similar facts, the same rule of damages for gain prevented for the loss of the purchase, was adopted, as in the Squire case. It is to be observed that in *True vs. Tel. Co.* the acceptance DID NOT CLOSE A CONTRACT, but was conditional on securing "freight at ten," and it was shown or assumed that the condition would have been complied with, as in this case IT IS SHOWN that Hall's agent would have purchased the oil.

In *Rittenhouse vs. Tel. Co.*, 44 N. Y., 263, there was a loss of a purchase of stocks, and while it is true that the plaintiff

replaced the stocks by purchase as soon as the mistake was discovered, it is said, broadly adopting the rule based on the market price: "It was not incumbent on the plaintiff to purchase the stock. This purchase and the price * * * was only important as showing the extent of the damage. The plaintiffs could have maintained their suit against the defendants without having purchased the stock by showing that immediately, or soon after the delivery of the erroneous message, the stock was *in the market* so that their order could not have been filled for less than the $139.50 per share."

The result of all these cases and many others that might be cited is that THE NEGLIGENCE OF THE TELEGRAPH COMPANY WAS OPERATIVE IN FULL FORCE UP TO THE TIME when Hall could with reasonable diligence have purchased the oil after notice of the negligence, and that the damages for gain prevented are to be computed as certain, from the market price or actual value of the oil at that time, without proof that the oil would have been sold at that time and the gain realized *in money*, the gain at that time is deemed certain in the value of the oil, and without proof as to future transactions to diminish or increase the damages, as too remote and uncertain.

III.

THAT CERTAIN OR SUFFICIENT FACTS DO NOT APPEAR affecting the rule of damages would simply defeat the special jurisdiction of the court to answer the question.

In *United States vs. Bank*, 19 How., 384, it is said: "In considering this certificate of division and the inquiry it propounds, an INSUPERABLE DIFFICULTY is perceived arising from the partial or imperfect form in which the facts assumed as the foundation of the inquiry are presented, and FROM THE OBVIOUS ABSENCE OF FACTS AND CIRCUMSTANCES PERTINENT TO THE CASE, and by which, if disclosed, its complexion MIGHT BE ENTIRELY CONTROLLED." The court refused to answer the question.

In *Daniels vs. Railroad Co.*, 3 Wall., 255, where there was a similar absence of facts, it is said, in reference to *United States vs. Bank of Columbus*, 19 How., 384: "Where the question certified was whether a letter written by a cashier without the knowledge of the directors was binding on the bank, THIS COURT DECLINED TO ANSWER BECAUSE THE SOLUTION OF THE QUESTION DEPENDED IN PART UPON FACTS NOT STATED IN THE CERTIFICATE," * * * and on page 257: "At the threshold arises an important question of fact not without difficulty. It is whether the plaintiff is to be regarded as a passenger or a servant of the defendant at the time he received upon the locomotive the injury for which he sues. Upon the determination of this question depend the legal principles to be applied. They must be different as the solution may be one way or the other." And the court refused to answer the questions.

It is to be observed that it is evident, and seems to be conceded, that the FACTS THAT DO NOT APPEAR, in this case, are capable of proof one way or the other; that is, whether it was the purpose or intention of Hall to purchase the oil in the expectation of profits to be derived from an immediate resale, and whether he would have sold the next day, or could have resold at a profit any subsequent day. It is urged that under the settled practice of the court the question as to the rule of damages, in this situation, should not be answered, but the judgment in this respect should be allowed to stand.

It is to be observed that in this respect a case on a certificate of division of opinion for the answer of a question is wholly unlike a case where this court has full jurisdiction and where, if the facts found are not sufficient to sustain the judgment, it must be reversed, but even in such case the suit is remanded for a new trial, unless the special findings are sufficient affirmatively to entitle the other party to judgment.

## IV.

THAT IF THE JUDGMENT IS NOT AFFIRMED THE CASE SHOULD BE REMANDED FOR A NEW TRIAL.

*Daniels vs. R. R. Co.*, 3 Wall., 255.
*Ex parte French*, 91 U. S., 423.
*Exchange Bank vs. Third Nat. Bank*, 112 U. S., 293.

In *Daniels vs. R. R. Co.*, 3 Wall., 255, it is said:

"Only the points certified are before us. The cause remains in the circuit court, and may be proceeded in by that court according to its discretion."

In *Ex parte French*, 91 U. S., 426, it is said by Chief Justice Waite:

"The finding brought here was special, and met only a part of the issue. * * * We have, however, determined that the facts found are not sufficient to justify the conclusion reached. * * * Our action only precludes that court from adjudging in favor of the defendants upon the SPECIAL FACTS FOUND AND SENT HERE for our opinion. In all other respects it is at liberty to proceed in such manner as, according to its judgment, justice may require."

It is to be observed that the facts found do not show the price paid for the message for which judgment is ordered to be entered.

It is also urged that there is no finding inconsistent with Hall's right to show, on a new trial, that it was his purpose or intention to purchase the oil in the expectation of profits to be derived from an immediate resale, and that he would have sold the next day, or could have sold at a profit at a subsequent day, and still be entitled to recover upon a new trial. There is simply an absence of findings on these matters.

Otherwise, in every case where the facts found were not sufficient to sustain the judgment, the other party would be entitled to judgment, which does not at all follow, as on a

new trial the absence of facts may be supplied in favor of the party having the judgment. The stipulation of facts and evidence used on the trial in the court below is *functus officio.* At any rate, its effect on the case is not before this court for consideration. No question is asked in reference to it. Whether, on a new trial, the plaintiff is to be limited to the evidence on which the case was submitted on a former trial, is a question for the court below when it is reached there. The stipulation was not exclusive of other evidence, as its heading discloses, to-wit:

"Stipulation of facts TO BE USED in the trial of the above action."

An insufficient or defective statement of facts is always subject to be reopened or set aside.

*Gregory vs. Pierce*, 4 Met., 480.
*Merian vs. Merian*, 6 Cush., 91.
*Sheridan vs. Ireland*, 61 Me., 486.

These suggestions on this point are largely in the dark as to the ground on which the order for judgment was made.

Respectfully submitted,

CHARLES A. CLARK,
*of Counsel.*

CROM. BOWEN,
WHITING S. CLARK,
*Attys. for Defl. in Error.*

*Certificate of Counsel:*

I certify that I have carefully examined the foregoing petition and the grounds and questions therein, and that in my opinion the grounds therein set forth are sufficient to establish a result in favor of the defendant in error.

Chas. A. Clark, *Of Counsel.*